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No. 00-**00 . 946**

IN THE
Supreme Court of the United States

S.S., by and through Her Next Friend and Guardian *Ad Litem*, ELLEN D. JERVIS,

Petitioner,

v.

MICHELLE McMULLEN, SHERRY JACOBY, and KATHLEEN BARNETT,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

ELLEN D. JERVIS
Counsel of Record
LISA A. WEIXELMAN
POLSINELLI SHALTON & WELTE, P.C.
Attorneys for Petitioner
700 W. 47th St., Suite 1000
Kansas City, MO 64112
(816) 753-1000

163594
Counsel Press LLC
(800) 274-3321 • (800) 359-6859

QUESTIONS PRESENTED

Whether the state's action in delivering a five-year-old child in its custody to a parent whom it knows to be dangerous constitutes an action that can give rise to § 1983 liability as held by two federal courts of appeals.

Whether the state's action in knowingly delivering a five-year-old child in its custody to a parent whom the state knew would allow a pedophile to sodomize her constitutes deliberate indifference and shocks the conscience.

PARTIES TO THE PROCEEDING

Petitioner

S.S. by and through Her Next Friend and Guardian Ad Litem, Ellen D. Jervis.

Respondents

Michelle McMullen, Sherry Jacoby, Kathleen Barnett, and Cynthia M. Montgomery, Ph.D. Respondent Montgomery is not a party to the appeal.

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Petitioner respectfully petitions for a writ of certiorari to review the judgment of the Eighth Circuit Court of Appeals in this case.

OPINIONS BELOW

The Eighth Circuit panel opinion (App. B) is reported at *S.S. ex rel. Jervis v. McMullen*, 186 F.3d 1066 (8th Cir. 1999). The Eighth Circuit en banc opinion (App. A) is reported at *S.S. ex rel. Jervis v. McMullen*, 225 F.3d 960 (8th Cir. 2000) (en banc).

STATEMENT OF JURISDICTION

The judgment of the Eighth Circuit Court of Appeals en banc was entered on September 13, 2000 (App. A).

The jurisdiction of this Court is invoked under 28 U.S.C. §§ 1254(1) and 2106.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involved provisions of the Fourteenth Amendment to the United States Constitution:

> [N]or shall any state deprive any person of life, liberty, or property, without due process of law . . .

U.S. Const. Amend. XIV, § 1.

42 U.S.C. § 1983

> Every person who, under color of any statute, ordinance, regulation, custom or usage, of any state or territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the constitution and laws . . .

STATEMENT OF THE CASE

The Division removed S.S. from her parents' legal and physical custody when she was three years old. The Division had substantiated several child abuse hotline calls and, on April 5, 1994, the Circuit Court of Cass County, Missouri placed S.S. in the Division's permanent custody for placement in foster care. The Division kept her in its custody for approximately two and one half years — until August 1996.

Respondents Michelle McMullen and Sherry Jacoby are social workers in the Missouri Division of Family Services. The Division assigned them to S.S.'s case in February and May of 1994, respectively. Respondent Kathleen Barnett supervised McMullen and Jacoby, receiving and approving all dictation, correspondence and written reports regarding S.S. at all times relevant to her complaint. The Division initially allowed S.S. supervised visits with her father under the supervision of McMullen while she was in state custody. A convicted child molester, Joel Griffis, attended three of these visits. Griffis later was present at unsupervised visits, which respondents also knew.

The respondents first learned that child molester Griffis presented a danger to S.S. when McMullen received an anonymous phone call on September 20, 1995, stating that, "a man named Joel who has been convicted of numerous sex charges has been around [S.S.] and her father." McMullen further learned that S.S.'s father had allowed contact between Griffis and S.S. on nine occasions between October 1995 and August 1996.

The Division had a psychological evaluation conducted on S.S.'s father by Dr. Gregory Sisk in May of 1996, and McMullen received a copy of that evaluation. Dr. Sisk expressed concern and cautioned the Division that returning S.S. to her father's custody might place her at risk. Dr. Sisk stated that, "[h]e seems dangerously sympathetic with a known child sexual offender, which would appear to be very risky behavior," and that, "children in his care could be at risk of abuse/neglect due to his beliefs about child rearing." Sisk further stated that "[p]lans towards reunification should proceed cautiously." In July 1996, McMullen also became aware of an anonymous child abuse hotline call to her office that stated, "S. had a rash 'down there' that there is a man who hangs around the household that S.S. calls grandpa and that he used to be a child molester." McMullen investigated the report by questioning S.S. at her day care and by visually examining her genital area but failed to contact law enforcement authorities or to have the child examined by medical professionals. The child molester himself contacted McMullen on August 13, 1996, stating that he felt it was unfair to limit his contact with S.S.

Jacoby, too, knew of S.S.'s peril. She documented her knowledge of the anonymous call to McMullen regarding Griffis' history as a child molester. She also knew of a

telephone call from S.S.'s foster mother to the Division on June 20, 1995 stating that, "S. told her over and over that she humps with her daddy." Jacoby also knew S.S. exhibited inappropriate sexual acting out behaviors on at least three occasions. Further, she documented her knowledge of Joel Griffis' presence at unsupervised visits between S.S. and her father and received a call from the foster parent in October 1995 stating that Griffis was with the father when he arrived to pick up the child for a visit. Jacoby also knew on December 19, 1995 that S.S. had a yeast infection and complained of "hurting in her vagina area."

Despite this knowledge, starting in March of 1996, McMullen, Jacoby and Barnett sent S.S. to live with her father on a full-time "extended visit." McMullen — eight days after Griffis' call complaining of limits on his contact with S.S. and three months after Dr. Sisk's report — requested that the Cass County Circuit Court release S.S. from the custody of the state and return her to the legal custody of the father. On August 22, 1996, the court granted McMullen's request, returned S.S. to the custody of her father and released the child from the court's jurisdiction. McMullen's dictation on that date recounts that she and her supervisor (Barnett) decided "that if something happens to S. because he [the father] knows what Joell [sic] has done in the past that he will be solely responsible."

In February 1997, a child abuse hotline alleged that Griffis had sexually molested S.S. on November 15, 1996 and January 15, 1997 (including periods of time when the father had allowed Griffis to live with him and S.S). Griffis was charged with two counts of first degree statutory sodomy in Jackson County and two counts of sodomy in Cass County. S.S.'s father was charged with felony child

endangerment in both Jackson and Cass Counties. As a result of the sexual abuse she suffered, S.S. was hospitalized for one week. She remained institutionalized at a psychiatric facility in Kansas City when her guardian ad litem filed the Complaint.

A. The United States District Court for the Western District of Missouri, Western Division

On the respondents' Motion to Dismiss and prior to any discovery, the United States District Court for the Western District of Missouri, Western Division, granted the motion and dismissed S.S.'s Complaint. App. C. The district court ruled that the petitioner's allegations do not give rise to a due process claim and that the respondents are protected from liability by absolute and qualified immunity. The court declined to discuss the immunity issues, relying on *DeShaney v. Winnebago County Dept. of Social Services*, 489 U.S. 189 (1989). The court held that the respondents had no substantive due process duty to protect the petitioner from harm by a private third-party individual. The court recognized that *DeShaney* imposes a duty on state actors to protect its citizens "in custodial and other settings in which the state has limited the individual's ability to care for themselves (custodial cases); and second, when the state affirmatively places a particular individual in a position of danger the individual would not otherwise have faced (state-created danger cases)." *Norfleet v. Arkansas Dept. of Human Services*, 989 F.2d 289, 293 (8th Cir. 1993) (quoting *Gregory v. City of Rogers, Ark.*, 974 F.2d 1006, 1010 (8th Cir. 1992) (en banc), *cert. denied*, 507 U.S. 913 (1993)). The district court stated that the abuse occurred after she was returned to her father's custody and that there was no special or custodial relationship with the state. Further, although "an

argument can be made that the State's actions placed plaintiff in a greater position of danger or vulnerability because the state interfered with any potential rescue by private persons," the state did not place S.S. in a position of danger she would not otherwise have faced. App. C at 52a.

B. United States Court of Appeals for the Eighth Circuit

On the petitioner's appeal from the decision of the Western District of Missouri, the United States Court of Appeals for the Eighth Circuit reversed the judgment of the district court and remanded the case for further proceedings. *See S.S. ex rel. Jervis v. McMullen*, 186 F.3d 1066 (8th Cir. 1999). The panel ruled that the respondents did not merely fail to protect S.S. from the child molester, but that they affirmatively placed S.S. into Griffis' path. App. B at 38a. The court stated that *DeShaney* did not control the present case and recognized "a viable claim under the 'state-created danger' theory, which recognizes the obligation of state actors to subsequently ***protect*** an individual after they have created a danger to the individual's well-being." App. B at 32a (emphasis in original). The court found that "this case primarily concerns S.S.'s right not to be injured by the state — essentially a 'negative liberty' — a right which both predates *DeShaney* and is broader than S.S.'s right to be protected by the state, the 'positive' liberty that *DeShaney* limited." App. B at 34a-35a.[1]

1. This is not a "positive liberties" case, like *DeShaney*, where the question was whether the Constitution entitles a child to governmental protection against physical abuse by his parents or by other private persons not acting under the direction of the state. The Supreme Court agreed with this court that there is no such entitlement. Here, in contrast, the state removed a child from the custody of her parents;

(Cont'd)

The court also found that the respondents acted with the requisite degree of culpability, stating that the facts supported the notion that the respondents were deliberately indifferent to a known substantial risk of serious harm to the petitioner. App. B at pp. 39-40a. The court found that the respondents' deliberate indifference shocked the conscience under the "continuum of 'deliberately indifferent' conduct" set forth in *County of Sacramento v. Lewis*, 523 U.S. 833 (1988). App. B at 41a.

The court granted rehearing at respondents' request and vacated the panel opinion. The court *en banc* affirmed the order of the district court. *S.S. ex rel. Jervis v. McMullen*, 225 F.3d 960 (8th Cir. 2000) (en banc). In doing so, the court found that the state, by returning S.S. to her father, did not increase the danger of significant harm to S.S.; "it merely placed her back into the situation from which it originally retrieved her." The court stated that, "*DeShaney* speaks specifically to this kind of situation." App. A at 4a.

The court drew a distinction between exposing a child to a dangerous environment and returning her to an equally

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(Cont'd)

> having done so, it could no more place her in a position of danger, deliberately and without justification, without thereby violating her rights under the due process clause of the Fourteenth Amendment than it could deliberately and without justification place a criminal defendant in a jail or prison in which his health or safety would be endangered, without violating his rights . . . under the cruel and unusual punishments clause . . . if he was a convicted prisoner, or the due process clause if he was awaiting trial.

K.H. ex rel. Murphy v. Morgan, 914 F.2d 846, 848-49 (7th Cir. 1990).

dangerous one. App. A at 5a.[2] The court found that the state "did do something" but that, in the "peculiar circumstances," that act was the equivalent of doing nothing. App. A at 6a.

The court further found that the state's action did not rise to the level of acts that shock the conscience.[3] In finding that S.S. alleged negligence only, the court cited the state's obligation to reunite children with their parents if possible.

REASONS FOR GRANTING THE WRIT

I. THE DECISION BELOW CONFLICTS WITH THE DECISIONS OF TWO FEDERAL COURTS OF APPEALS AND AGGRAVATES THE EXISTING SPLIT OF AUTHORITY IN THE DISTRICT COURTS

Since this Court decided *DeShaney v. Winnebago County Department of Social Services*, 489 U.S. 189 (1989), a dangerous uncertainty has existed in defining the circumstances that give rise to a constitutional duty by the state to provide protection to individuals from private acts of violence. *DeShaney* essentially held that state actors generally have no due process obligation to protect private parties from other private parties. The state's duty to protect its citizens from each other is limited. However, *DeShaney* did leave open the question of whether due process rights are violated when the state affirmatively places a child previously in state custody into circumstances that

2. *See K.H. ex rel. Murphy v. Morgan*, 914 F.2d 846, 848-849 (7th Cir. 1990).

3. *See County of Sacramento v. Lewis*, 523 U.S. 833, 850 (1998).

render her more vulnerable and susceptible to danger. *See id.* at 201. Different circuits have answered this question differently. In several circuits, the state has been held liable when it places a child with a foster parent known or suspected of being a child abuser.[4] Other circuits, under the "state-created danger" theory, have also found liability when the state actors affirmatively placed a child with an abusive parent or relative.

Here, the Eighth Circuit held that such a placement with an abusive parent was not actionable even while recognizing that other courts have found liability. The decision itself admits that "a leading case involving similar circumstances in another circuit reached a contrary result." App. A at 5a. The court then attempts to distinguish its opinion from the Seventh Circuit's decision in *K.H. ex rel. Murphy v. Morgan*, 914 F.2d 846 (7th Cir. 1990). Both cases involved social service workers placing a child in the custody of a person known to be a child abuser.[5] In the Seventh Circuit, the state's deliberate act in *K.H.* was actionable; in the Eighth Circuit, because S.S. was returned to her father's custody instead of placed with a foster parent, the court concluded that she was not exposed to a different danger from which she was removed. Even while admitting that the state "did do something here," the court held that "the state's act is the same as if it had done nothing" in the "peculiar circumstances" presented here. App. A at 6a.

4. *See Norfleet v. Arkansas Dept. of Human Services*, 989 F.2d 289 (8th Cir. 1993); *K.H. ex rel. Murphy v. Morgan*, 914 F.2d 846 (7th Cir. 1990); *Meador v. Cabinet For Human Resources*, 902 F.2d 474 (6th Cir. 1990), *cert denied*, 498 U.S. 867 (1990); *T.M. ex rel. R.T. v. Carson*, 93 F. Supp. 2d 1179 (D. Wyo. 2000).

5. In *K.H.*, the state delivered the child to an abusive foster home, not a natural parent.

Despite attempting to distinguish *K.H.*, the court did not recognize that the Seventh Circuit has extended liability beyond abusive foster care situations.[6] Chief Judge Posner stated in another case that, "if the defendants' employees knowingly placed [the child] in a position of danger [with her father] they would not be shielded from liability by the decision in *DeShaney*." *Bank of Illinois v. Over*, 65 F.3d 76, 78 (7th Cir. 1995). The Seventh Circuit also held "If the officers are complicit in the violence, they are liable." *Id.* Chief Judge Posner cites *K.H.*; *L.W. v. Grubbs*, 974 F.2d 119 (9th Cir. 1992), *cert denied*, 508 U.S. 951 (1993); and *Freeman v. Ferguson*, 911 F.2d 52 (8th Cir. 1990), all of which recognize the "state-created danger" theory. Under these cases, state actors must subsequently protect an individual after they have created a danger to that individual's well being.

Also in 1995, in *Camp v. Gregory*, 67 F.3d 1286, 1294 (7th Cir. 1995), *cert denied*, 517 U.S. 1244 (1996), the Seventh Circuit recognized the right of a child not to be placed with a caregiver that the state knows cannot provide adequate guidance and supervision. In *Camp*, the custodian was the child's aunt. Again, contrary to the Eighth Circuit's opinion here, the Seventh Circuit found that *DeShaney* did not categorically remove custody transfers from actionable due process claims.

Unlike the Eighth Circuit's characterization of custody transfers as "inaction," the Seventh Circuit has ruled that *DeShaney* would not shield the state from liability if

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6. *K.H.* goes on to say, "The only right in question in this case is the right of a child in state custody not to be handed over by state officers to a foster parent or other custodian, private or public, ***whom the state knows or suspects to be a child abuser.***" *Id.* at 852.

presented with the facts in the instant case. As Judge Gibson articulates in his dissent,

> These distinctions, between new dangers and old and between foster parents and natural parents, are arbitrary. I believe the proper distinction is whether the state actors have so intervened in the child's situation that they can be said to have rescued the child from danger.

App. A at 16a. This view is consistent with the decisions in the Seventh Circuit.[7]

The Third Circuit has also found that custody transfers are not absolutely shielded from liability under *DeShaney*. *See Ford v. Johnson*, 899 F. Supp. 227, 233 (W.D. Pa. 1995), *aff'd without opinion*, 116 F.3d 367 (3d Cir. 1997). Like the Eighth Circuit, the Third Circuit has recognized the "state-created danger" theory in cases where state actors have increased the plaintiff's risk of harm.[8] Unlike the Eighth Circuit, the Third Circuit has specifically recognized that a custody transfer to a known abusive biological parent caregiver is not an "inaction" but is instead an affirmative act of endangerment.

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7. "If the state puts a man in a position of danger from private persons and then fails to protect him, it will not be heard to say that its role was merely passive; it is as much an active tortfeasor as if it had thrown him into a snake pit." *Bowers v. DeVito*, 686 F.2d 616, 618 (7th Cir. 1982).

8. *See Kneipp v. Tedder*, 95 F.3d 1199 (3d Cir. 1996) (police officers increased the risk of harm to an intoxicated pedestrian); *Freeman v. Ferguson*, 911 F.2d 52 (8th Cir. 1990) (police chief interfered with restraining order, creating the danger that resulted in victims' deaths).

> The fact that the child is placed with a parent as opposed to a foster parent should not change the standards by which social agencies and their employees conduct their investigations. It is important to remember that in the case at bar, Shawntee had not been in the custody of her father, but, rather, had been in the custody of CYS and was placed with her father by the Court after a CYS investigation and recommendation.

Id. at 233.

In another district court case from the Third Circuit, *Tazioly, et al. v. City of Philadelphia*, 1998 WL 633747, *5 (E.D. Pa.), the court held that the Department of Public Welfare could be held liable for returning a child to a parent whom they knew to be unfit and dangerous. The municipality, "by taking deliberate steps to terminate successful two-year foster care and entrust Michael to the custody of his biological mother was as much an active tortfeasor as if it had thrown him into a snake pit." *Tazioly* at 12, citing *Bowers v. DeVito*, 686 F.2d 616, 618 (7th Cir. 1982). The facts of *Tazioly* are strikingly similar to the facts here — return of a minor child, after a lengthy period of state custody, to a parent that the state knew presented a danger to the child.[9] *Ford* also presented a very similar fact pattern involving return of a child to a known abusive parent after a foster care placement. In both cases, this affirmative act by the state was sufficient to allow liability under the "state-created danger" theory.

In a district court case now pending before the Tenth Circuit Court of Appeals (argued September, 2000), the issue

9. *Tazioly* settled after the district court's decision.

of whether *DeShaney* bars liability when a child is placed with a natural parent whom the state knows to be dangerous was also addressed. Citing *Ford* and *Tazioly*, the district court found that, "If Plaintiffs can prove Defendants had sufficient information indicating Anthony's father was dangerous, before the state relinquished custody, Plaintiffs may be able to make out a claim for violation of Anthony's right to substantive due process." *Currier v. Doran*, 23 F. Supp. 2d 1277, 1281-82 (D. N.M. 1998).

All of these cases have found a custody transfer to a natural parent or relative as described in S.S.'s complaint to be an affirmative act that was held to be actionable. Only in the Eighth Circuit is there an additional prerequisite that the plaintiff must be exposed to a different danger than that from which she was removed or else "the state's act is the same as if it had done nothing." App. A at 6a. This distinction is inconsistent with other courts' interpretation of *DeShaney*.

II. THE DECISION OF THE COURT OF APPEALS MISAPPLIES THE STANDARD SET FORTH BY THIS COURT IN *LEWIS*.

The court below found that the facts in S.S.'s Complaint rise to the level of negligence only. This finding misapplies the standard of culpability set forth by this Court in *County of Sacramento v. Lewis*, 523 U.S. 833, 850 (1998); *Farmer v. Brennan*, 511 U.S. 825, 837 (1994); and *Davis v. Monroe County Board of Education*, 526 U.S. 629, 648 (1999).

"Deliberate indifference," unlike negligence, is actionable under § 1983. In finding deliberate indifference, this Court, in *Farmer v. Brennan*, stated that, "it is enough that the official acted or failed to act despite his knowledge

of a substantial risk of harm." (*Farmer*, 511 U.S. at 842). In *Davis*, this Court found that school officials were "deliberately indifferent" when their response to sexual harassment was "clearly unreasonable in light of known circumstances." 526 U.S. at 648. S.S.'s complaint recounts in great detail the state's knowledge that returning her to a parent "dangerously sympathetic with a known sexual offender" and who allowed that pedophile to have contact with her constituted a substantial risk of harm. The facts include an anonymous telephone call to the respondents regarding Griffis' history as a sexual offender, a child abuse hotline call alleging sexual abuse by Griffis, knowledge of S.S.'s inappropriate sexual behaviors, the pedophile's complaint about limits on his contact with S.S., and the warnings contained in Dr. Gregory Sisk's psychological evaluation. McMullen's own words condemn her by showing both her knowledge of the danger and her determination to deliver S.S. into it: that "if something happens to S. because he [the father] knows that Joell [sic] has done in the past that he will be solely responsible." The respondents' deliberate indifference to a known danger is spelled out in this written statement.

Since *Lewis* and *Davis* were decided, one court has addressed this issue in a foster care/child protection context. *See Nicini v. Morra*, 212 F.3d 798 (3d Cir. 2000). There, the Third Circuit examined the "deliberate indifference" standard. Citing *Farmer*, the court recognized that courts of appeals have applied the "deliberate indifference" standard outside of the Eighth Amendment context and have found liability when "the official knows of and disregards an excessive risk . . ." and that the official must both "be aware of facts from which the inference could be drawn that a substantial risk of serious harm exists, and he must draw the

inference." *Nicini* at 811, citing *Farmer*, 511 U.S. at 837. McMullen's statement that the father will be "solely responsible" for harm to S.S. clearly shows that she not only was aware of the facts, but that she also drew the inference.

Despite this evidence, the court below instituted a balancing test that reduces this level of egregiousness to negligence. In doing so, the court looked outside the record. The court stated that "it was her father who was seeking custody of her." App. A at 6a. The Complaint makes no such allegation. In fact, if discovery had been allowed, the record would show the father's hesitance to acquire custody throughout the pendency of the state's jurisdiction over the child. The court further relies upon the "state's obligation to reunite children with their parents if possible" as a factor to negate the egregiousness of the respondents' conduct. While this obligation was paramount at one time, Missouri child welfare policy has changed. In 1995 the applicable statute already reflected this shift from reunification with parents to the best interests of the child. *See* Mo. Rev. Stat. § 211.011 (1995). "The child welfare policy of this state is what is in the best interests of the child." *Id.* The phrase "preferably in his own home" was specifically deleted from the end of the sentence, "each child coming within the jurisdiction of the juvenile court shall receive such care, guidance and control . . ." in 1995. H.B. Nos. 232 and 485, and S.B. No. 174. This policy change in Missouri is consistent with federal policy under the Adoption and Safe Families Act of 1997[10] that places the safety of children as the paramount concern in placement decisions. This shift in policy should be reflected in any balancing test, especially since reunification for its own sake is never a goal.

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10. 42 U.S.C. § 671.

The court below went on to say that while deliberate indifference, even if found, might "shock the conscience" in certain contexts, citing *Lewis* at 850, it found no similarities between this case and Supreme Court cases where a substantive due process claim was found. App. A at 7a. *Lewis* stated that "deliberate indifference that shocks in one environment may not be so patently egregious in another . . ." 523 U.S. at 850.

The facts in S.S. where a child is in state custody and then is placed in her father's custody are more comparable to the reasoned medical treatment of prisoners context than a high speed police chase and its incumbent split-second decisions. *See Nicini* at 810. The Complaint is replete with examples of the details and information available to the respondents over a two-and-a-half-year period before they decided to deliver S.S. to her father and a known pedophile. Their deliberation and unhurried judgment is set forth in the Complaint, including their knowledge that "something" would happen to S.S. and their desire that the father, rather than themselves, would be "solely responsible." They were not acting, as police officers during a chase, without the opportunity to deliberate over the results of their actions; even without the benefit of formal discovery, their own words show both their deliberation and their deliberate indifference.

The respondents' actions in this case rise to the level of "deliberate indifference" as defined by this Court and other federal courts of appeals[11] and their two-and-one-half-year period of deliberation regarding the evidence of risks to S.S. shocks the conscience.

11. There is no liability "unless the official knows of and disregards an excessive risk . . ." *See Farmer v. Brennan*, 511 U.S. 825, 837, 119 S. Ct. 1970, 128 L. Ed. 2d 811 (1994); time "to make (Cont'd)

III. THE QUESTIONS PRESENTED ARE IMPORTANT.

Approximately 560,000 children are currently in foster care in this country. The stated case goal in 42 percent of these cases is to reunify the child with a parent or principal caregiver. The average stay in foster care is two years.[12] The decision below makes it unclear what circumstances rise to the level of a constitutional duty by the state to provide protection to children from private acts of violence when custody is transferred to a parent. While the state's primary obligation at one time was to reunify a child with the parents, a shift away from this mandate has occurred in the last ten years. Numerous high-profile child deaths due to abuse by parents, plus an increase in the number of children in foster care, have led to concerns that the child welfare system needs to find a way to strike the right balance between safety and permanency. Recent changes in both federal and state policy reflect this concern; the Adoption and Safe Families Act of 1997 mandates that child safety is now the paramount concern in all child welfare decision-making and, as

(Cont'd)
unhurried judgments." *See Nicini v. Morra*, 212 F.3d 798, 811 (3d Cir. 2000); "Plainly placed on notice of damages and chose to ignore the danger." *See Taylor v. Ledbetter*, 818 F.2d 791, 796 (11th Cir. 1987), *cert denied*, 489 U.S. 1065 (1989); "Defendants may be held liable [for] . . . deliberate indifference to a known injury, a known risk or a specific duty." *See Doe v. New York City Dep't of Soc. Services*, 649 F.2d 134, 145 (2d Cir. 1981), *cert denied*, 464 U.S. 864 (1983).

12. U.S. Dept. of Health and Human Services, *Child Welfare Outcomes 1998: Annual Report*, <www.acf.dhhs.gov/programs/cb/outcomes/childwelfare/Sec1/sec1.html>.

discussed above, changes in the Missouri child welfare policy in 1995 also reflect this shift.[13]

Child welfare workers must decide whether to place a child back into the home after a period of time in foster care. When making such a decision, guidance is needed to clarify the parameters of a child's right to be safe from placement by the state with a parent workers know is abusive. Due to the vast number of children out of their parents' custody, and increasing pressure to find permanent placements, this issue is one that state welfare workers face on a regular basis. Uncertainty in the standard for violations of the substantive due process rights of the children they are entrusted to protect from harm presents an important issue that this Court must decide.

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13. U.S. Dept. of Health and Human Services, *Child Welfare Outcomes 1998: Annual Report*, <www.acf.dhhs.gov/programs/cb/outcomes/childwelfare/Sec4.html>.

CONCLUSION

For the reasons set forth above, the petition for a writ of certiorari should be granted.

Respectfully submitted,

ELLEN D. JERVIS
Counsel of Record
LISA A. WEIXELMAN
POLSINELLI SHALTON & WELTE, P.C.
Attorneys for Petitioner
700 W. 47th St., Suite 1000
Kansas City, MO 64112
(816) 753-1000

APPENDIX

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT DATED AND FILED SEPTEMBER 13, 2000

UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

No. 98-1732

S.S., by and through Her Next Friend and Guardian *Ad Litem*, Ellen D. Jervis,

Appellant,

v.

Michelle McMullen, Sherry Jacoby, and Kathleen Barnett,

Appellees, and

Cynthia M. Montgomery, Ph.D.,

Defendant.

National Association of Counties, Association of Minnesota Counties, Minnesota County Attorneys Association, and County of Hennepin,

Amici Curiae.

Appeal from the United States District Court for the Western District of Missouri.

Appendix A

Submitted: January 14, 2000

Filed: September 13, 2000

Before WOLLMAN, Chief Judge, and McMILLIAN, RICHARD S. ARNOLD, JOHN R. GIBSON, BOWMAN, BEAM, LOKEN, HANSEN, MORRIS SHEPPARD ARNOLD, and MURPHY, Circuit Judges.[1]

MORRIS SHEPPARD ARNOLD, Circuit Judge.

This is an action to recover damages under 42 U.S.C. § 1983 for the violation of substantive due process rights. When S.S. appealed from the district court's dismissal of her complaint for failure to state a claim, a panel of our court reversed. *See S.S. ex rel. Jervis v. McMullen*, 186 F.3d 1066 (8th Cir. 1999), *vacated* (8th Cir. Sept. 30, 1999). We granted rehearing and vacated the panel opinion. We now affirm the order of the district court.[2]

I.

S.S. alleged in her complaint that three employees of the Missouri Division of Family Services acted unconstitutionally when they released her from state custody and returned her to her father, although they had notice that her father was allowing her to have contact with the known

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1. The Honorable Kermit E. Bye, United States Circuit Judge, did not participate in the consideration of this case.

2. The Honorable Scott O. Wright, United States District Judge for the Western District of Missouri.

pedophile who subsequently sodomized her on at least two occasions. S.S. also alleged that, before her return to her father, the known pedophile himself called one of the defendants to complain that it was unfair to try to limit his contact with S.S.

The *locus classicus* for determining whether these facts, if proved, would give rise to liability for a constitutional tort is *DeShaney v. Winnebago County Department of Social Services*, 489 U.S. 189 (1989). In that case, the Court approved summary judgment against Joshua DeShaney, who claimed that although the state removed him temporarily from the custody of his abusive father, it did not do so permanently, and that his father finally beat him so severely that he suffered permanent brain damage. *Id.* at 193. The Court emphasized that the constitutional right to be free from bodily harm is a right secured only against state actors, not against private ones: The purpose of the fourteenth amendment "was to protect the people from the State, not to ensure that the State protected them from each other." *Id.* at 196. In denying Joshua a recovery, the Court remarked that while the state may have been aware of the dangers that Joshua faced, "it played no part in their creation, nor did it do anything to render him any more vulnerable to them." *Id.* at 201.

It is perhaps this last asseveration in *DeShaney*, namely, that the state did nothing to render the plaintiff more vulnerable to risks created by others, that has led some courts, including ours, to conclude that if the state acts affirmatively to place someone in a position of danger that he or she would not otherwise have faced, the state actor, depending on his

or her state of mind, may have committed a constitutional tort. *See, e.g., Gregory v. City of Rogers, Arkansas*, 974 F.2d 1006, 1010 (8th Cir. 1992), *cert. denied*, 507 U.S. 913 (1993). While the correctness of that principle as a general matter is indisputable, we hold that it cannot give rise to liability in the present case for the simple reason that in returning S.S. to her father, the state did not increase the danger of significant harm to S.S.: It merely placed her back into the situation from which it had originally retrieved her.

We think that *DeShaney* in fact speaks specifically to this kind of situation. The Court held there that the state was not liable to Joshua, because "when it returned him to his father's custody, it placed him in no worse position than that in which he would have been had it not acted at all; the State does not become the permanent guarantor of an individual's safety by once having offered him shelter." 489 U.S. at 201. Our previous cases have emphasized this aspect of *DeShaney*. For instance, in *Wells v. Walker*, 852 F.2d 368, 370 (8th Cir. 1988), *cert. denied*, 489 U.S. 1012 (1989), we adverted to the proposition that a plaintiff in an action like the present one had to establish that "the state affirmatively place[d]" the plaintiff "in a position of danger [that he or she] would not otherwise have been in." It is true that two and a half years elapsed between the time that S.S. was taken from her father's custody and the time when she was returned to it, but we discern nothing in that interval that created a greater risk of abuse than the one that she would have faced had she never been taken from her father in the first place. In other words, the complaint contains no allegations that would justify a conclusion that by returning S.S. to her father the

state created greater risks to her than the ones to which she was originally exposed.

We are aware that a leading case involving arguably similar circumstances in another circuit reached a contrary result, *see K.H. through Murphy v. Morgan*, 914 F.2d 846 (7th Cir. 1990), but we think that its facts serve to distinguish it from our case. In *K.H.*, 914 F.2d at 849, the plaintiff sought compensation for injuries received when she was removed from her parents and placed in the custody of a foster parent who was known to be a child abuser. The court, relying on *DeShaney*, concluded that K.H.'s complaint stated a claim because the state had, if K.H. proved her case, placed her in a situation of danger. *Id.* The court did not advert to the statement in *DeShaney* that liability cannot be predicated on the state's deliberate act that returns a child to a risk that he or she was previously subject to, but we think that that is because that part of the holding in *DeShaney* was inapposite. In *K.H.*, 914 F.2d at 848-49, the state affirmatively exposed the plaintiff to a different danger from the one from which she was removed, that is, the state placed her in a foster home, and it was that act that was held to be actionable.

We are mindful that drawing a distinction between exposing a child to a dangerous environment and returning her to an equally dangerous one may seem to some to be gratuitous. The line between action and inaction has been important in the law for centuries, but it has proven to be an elusive and thin one; so it is perhaps not surprising that cases on either side of that line will be so close factually that drawing a legal distinction between them will often seem hard to justify. But we see the distinction nevertheless. While

the state did do something here, or at least in the present procedural posture we assume that it did, in the peculiar circumstances of this case the state's act is the same as if it had done nothing. The distinction is one, moreover, that we think *DeShaney* requires us to draw. The district court was therefore correct in dismissing S.S.'s complaint.

II.

We see another insuperable difficulty lying in S.S.'s way to a recovery. Even if the state in this case had acted affirmatively to create a danger to S.S., we think that the district court would nevertheless have been obliged to dismiss her complaint because the state's action did not rise to the level of egregiousness that is required to support an action for a substantive due process violation.

Assuming, as we must for present purposes, that the allegations in S.S.'s complaint are true, we think that they make out a case for negligence only. We come to this view not only because of the level of risk that a reasonable person would have assumed S.S. might be exposed to, but also because it was her father who was seeking custody of her. This last fact is one that must rest heavy in the balance in deciding the egregiousness of the defendants' conduct, because of the state's obligation to reunite children with their parents if possible; and we think that it serves to distinguish the case sharply from one in which the state delivered a child to, say, as in *K.H.*, a foster home that presented the same level of risk that S.S. alleges here.

In order to succeed, a complaint for a violation of substantive due process rights must allege acts that shock

the conscience, and merely negligent acts cannot, as a constitutional matter, do that: To hold otherwise "would trivialize the centuries-old principle of due process of law." *Daniels v. Williams*, 474 U.S. 327, 332 (1986). Even if the state's activities could be said to have been grossly negligent or even reckless in the circumstances present here, we believe that S.S.'s constitutional claim must fail. We have held more than once that gross negligence "is not actionable . . . under § 1983." *See Sellers by and through Sellers v. Baer*, 28 F.3d 895, 902-03 (8th Cir. 1994), *cert. denied*, 513 U.S. 1084 (1995). While deliberate indifference, depending on the circumstances and the kind of deliberation and indifference involved, might well shock the conscience, *see County of Sacramento v. Lewis*, 523 U.S. 833, 850 (1998), we see no similarity between our case and the Supreme Court cases in which a complaint was held to state a claim for the deprivation of substantive due process rights.

The Supreme Court's most recent pronouncement on relevant matters emphasizes that actionable cases must demonstrate a "level of . . . abuse of power," *id.* at 846, or activity that was "so 'brutal' and 'offensive' that it did not comport with traditional ideas of fair play and decency," *id.* at 847, quoting *Breithaupt v. Abram*, 352 U.S. 432, 435 (1957), itself quoting *Rochin v. California*, 342 U.S. 165, 174 (1952). Viewing the plaintiff's allegations in a light most favorable to her recovery, we cannot say that they describe the kind of conduct that violates substantive due process rights. We are mindful that the acts that S.S. claims were perpetrated against her once she was returned to her father were utterly indecent and egregious; and we do not doubt that those acts themselves would shock the conscience. They

certainly shock ours. But we focus here, not on those acts, but on the state's acts that S.S. says led to her injuries. We do not see how we could well hold those acts actionable without violating the Supreme Court's caveat against making "of the Fourteenth Amendment a font of tort law to be superimposed upon whatever systems may already be administered by the States," *Paul v. Davis*, 424 U.S. 693, 701 (1976).

III.

For the reasons indicated, we affirm the judgment of the district court.

JOHN R. GIBSON, Circuit Judge, with whom WOLLMAN, Chief Judge, and McMILLIAN, Circuit Judge, join, dissenting.

The court today holds that *DeShaney v. Winnebago County Department of Social Services*, 489 U.S. 189 (1989), determines the outcome of this case. *DeShaney*'s central holding is that state actors generally have no due process obligation to protect private parties from other private parties. 489 U.S. at 195-97. However, S.S. claims that she was harmed because of the reckless conduct of state actors who affirmatively endangered her. Because I believe her case differs crucially from the facts of *DeShaney* and its rationale, I would reverse the district court's dismissal of her complaint.

I.

According to her complaint, in January 1994 when S.S. was not quite three years old, she was taken into protective

custody by the Missouri Division of Family Services. S.S.'s father had allegedly smeared human feces onto her face, S.S. had been locked in her bedroom for periods of time by her parents, and she had been sexually abused by an unknown person. The authorities had also substantiated several child abuse hotline calls regarding the parents' neglect of S.S. On April 5, 1994, the Circuit Court of Cass County, Missouri, placed S.S. in the Division's permanent custody for placement in foster care.

Defendants Michelle McMullen and Sherry Jacoby are social workers in the Division and were assigned to S.S.'s case in February and May of 1994, respectively. Defendant Kathleen Barnett supervised both McMullen and Jacoby at all times relevant to her complaint; she received and approved all dictation, correspondence, and written reports regarding S.S. While S.S. was in the Division's custody, McMullen permitted S.S.'s father to visit S.S. under McMullen's supervision. A convicted child molester, Joel Griffis, was present during three of these visits in the summer of 1995.

The defendants later learned that Griffis was a child molester and that he presented a danger to S.S. First, McMullen received an anonymous phone call on September 20, 1995, stating that a man named "Joel" had been convicted of numerous sex offenses and had "been around" S.S. and her father. Second, McMullen learned from numerous sources that S.S.'s father had allowed contact between Griffis and S.S. on nine occasions between October 1995 and August 1996. Third, in May 1996, McMullen received a copy of a psychological evaluation of S.S.'s father. In it, Dr. Gregory Sisk expressed concern that returning S.S. to her father's

custody might endanger her welfare. Specifically, Dr. Sisk stated that a child in the care of S.S.'s father "could be at risk of abuse/neglect due to his beliefs about child rearing"; that the father "seems dangerously sympathetic with a known child sexual offender, which would appear to be a very risky behavior"; and that "plans toward reunification should proceed cautiously." Fourth, in July 1996, McMullen became aware of an anonymous child abuse hotline call stating that S.S. "had a rash 'down there' [and] that there is also a man who hangs around the household that S.S. calls grandpa and that he used to be a child molester." Although McMullen investigated this allegation by questioning S.S. at day care and visually examining her genital area, she neither contacted law enforcement authorities nor arranged to have S.S. examined by a medical professional. Fifth, McMullen received a telephone call from Griffis on August 13, 1996. During the call, Griffis stated that it was unfair for the Division to limit his contact with S.S.

Jacoby was similarly aware of S.S.'s peril. She documented her awareness of the anonymous call to McMullen that warned the Division about Griffis's presence. Further, she was aware of a telephone call from S.S's foster mother to the Division on June 20, 1995. The foster mother stated that "S. told her over and over that she humps with her daddy, Jon." Jacoby also knew that S.S. had exhibited inappropriate sexual behaviors on at least three occasions. Other telephone calls informed Jacoby that S.S.'s father permitted Griffis to be in S.S.'s presence. Finally, Jacoby knew on December 19, 1995 that S.S. had a yeast infection and complained of "hurting in her vagina area."

Appendix A

Already having permitted S.S.'s father to have unsupervised visits with his daughter, McMullen, Jacoby, and Barnett permitted S.S. to live with her father on a full-time, "extended visit" basis starting March 8, 1996. S.S. remained on this basis until McMullen — just eight days after Griffis's phone call and three months after Dr. Sisk's report — requested the Cass County Circuit Court to release S.S. from State custody and to return legal custody to the child's father. On August 22, 1996, the court granted McMullen's request, returned S.S. to her father, and released the child from the court's jurisdiction. McMullen's dictation of that day's events recounts that she and her supervisor (Barnett) decided "that if something happens to S. because he [the father] knows what Joell [sic] has done in the past that he will be solely responsible."

In February 1997, a caller to a Jackson County child abuse hotline alleged that Griffis had sexually molested S.S. on November 15, 1996 and January 15, 1997. Both incidents occurred during times that Griffis was living with S.S. and her father. Griffis was charged with two counts of first-degree statutory sodomy in Jackson County and two counts in Cass County. S.S.'s father was charged with four counts of felony child endangerment in Jackson County. As a result of the abuse that she suffered, S.S. was hospitalized for one week. She remained institutionalized at a Kansas City psychiatric facility when her guardian ad litem filed the instant complaint.

II.

DeShaney involved the substantive due process claim of the boy Joshua, who had been beaten repeatedly by his

father. *See* 489 U.S. at 192-93. When Joshua was treated at a hospital for bruises and abrasions, the Department of Social Services recommended that the boy be placed in the hospital's temporary custody. *See id.* at 192. Three days later, a "Child Protection Team" (consisting of Department caseworkers among others) determined that there was insufficient evidence of child abuse and that Joshua should be returned to his father's custody. *See id.* Later, caseworkers from the Department continued to monitor the DeShaney home, observed numerous suspicious injuries, and were twice informed of such injuries by emergency room personnel. However, caseworkers took no action to protect Joshua from his father. *See id.* at 192-93. Eventually, Joshua was beaten so severely that he suffered severe brain damage and was rendered profoundly retarded. *See id.* at 193. Joshua and his mother sued the Department and several of its employees for failing to protect Joshua from his father, but the Court held that the defendants had no duty under the Due Process Clause to protect the child. *See id.* at 195-97, 202.

In contrast to *DeShaney*, this case primarily concerns S.S.'s right not to be injured by the state — essentially a "negative liberty" — a right that both pre-dates *DeShaney* and is conceptually distinct from the right to be protected by the state, the "positive" liberty that *DeShaney* limited.[3] Judge

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3. This court and others have recognized two exceptions to *DeShaney*'s rule that state actors have no constitutional duty to protect people from each other: the "special relationship" exception and the "state-created danger" exception. *See Norfleet ex rel. Norfleet v. Arkansas Dept. of Human Servs.*, 989 F.2d 289, 293 (8th Cir. 1993); *Gregory v. City of Rogers*, 974 F.2d 1006, 1010 (8th Cir.

(Cont'd)

Appendix A

Posner (now Chief Judge) explained the distinction in *K.H. ex rel. Murphy v. Morgan*, 914 F.2d 846, 848-49 (7th Cir. 1990):

> This is not a "positive liberties" case, like *DeShaney*, where the question was whether the Constitution entitles a child to governmental protection against physical abuse by his parents or by other private persons not acting under the direction of the state. The Supreme Court agreed with this court that there is no such entitlement. Here, in contrast, the state removed a child from the custody of her parents; and having done so, it could no more place her in a position of danger, deliberately and without justification, without thereby violating her rights under the due process clause of the Fourteenth Amendment than it could deliberately and without justification place a criminal defendant in a jail or prison in which his health or safety would be endangered, without violating his rights . . . under the cruel and unusual punishments clause . . . if he was a convicted prisoner, or the due process clause if he was awaiting trial.

(Cont'd)

1992) (en banc). These "exceptions" to *DeShaney* are sometimes cited in situations that should not fall under the *DeShaney* rule in the first place; in their pure form, the exceptions concern liability for failures to protect the victim, whereas I believe this case involves an affirmative act of harm. Therefore, I do not consider the exceptions applicable to this case.

(citations omitted). *Accord Bowers v. DeVito*, 686 F.2d 616, 618 (7th Cir. 1982) ("There is a constitutional right not to be murdered by a state officer, . . . [b]ut there is no constitutional right to be protected by the state against being murdered by criminals or madmen.").

The court today recognizes that we must distinguish between failure to protect the victim and affirmative acts of endangerment. *Supra* at 4. Where I differ with the court is deciding where to draw the line between action and inaction. Unlike the court, I do not believe *DeShaney* puts custody transfers on the inaction side of that line.

The *DeShaney* plaintiffs did not attack the state's decision to transfer custody back to Joshua's father after the child's temporary emergency custody in the hospital. *DeShaney* offers no suggestion that the transfer itself was unwise, much less unconstitutional, given the defendants' knowledge at the time of the transfer. The *DeShaney* plaintiffs conceded that the state played no part in creating the danger that Joshua faced. *See id.* at 197; *see also DeShaney ex rel. First v. Winnebago County Dept. of Social Servs.*, 812 F.2d 298, 303 (7th Cir. 1987) ("[T]here is no evidence that the Department was reckless in returning Joshua to the custody of his father back in January 1983."). Rather, the plaintiffs based their constitutional claim upon the state's conduct after the state had relinquished custody of the child. *DeShaney* rejected their claim, for

> [w]hile the State may have been aware of the dangers that Joshua faced in the free world, it played no part in their creation, nor did it do

> anything to render him any more vulnerable to them. That the State once took temporary custody of Joshua does not alter the analysis, for when it returned him to his father's custody, it placed him in no worse position than that in which he would have been had it not acted at all.

489 U.S. at 201. This language must be taken in the context of a case in which the alleged due process violation happened *after* the state agency transferred custody. In contrast, S.S. claims that in the circumstances of her case, the transfer of custody was itself the due process violation.

Although "the State does not become the permanent guarantor of an individual's safety by having once offered him shelter," *DeShaney*, 489 U.S. at 201, state actors who rescue children and then injure them may not defend on the ground that they had no duty to rescue the children in the first place.

> There is no duty to rescue a bystander in distress, but having rescued him from certain death you are not privileged to kill him. This is not to say that you assume responsibility for his future welfare. You do not. Our point is only that the absence of a duty to rescue does not entitle a rescuer to harm the person whom he has rescued.

K.H., 914 F.2d at 849. *See also Wood v. Ostrander*, 879 F.2d 583, 591-95 (9th Cir. 1989) (denying qualified immunity defense to substantive due process claim where woman was raped after officer impounded her car and left her alone in known high-crime area).

Therefore, even though children have no substantive due process right to be protected from abusive parents, the state may not itself subject children to abuse by knowingly delivering them into the hands of abusive care givers. *See, e.g., K.H.*, 914 F.2d at 852 (recognizing right of child in state custody not to be handed over to foster parent or other custodian whom state knows or suspects to be child abuser); *Nicini v. Morra*, 212 F.3d 798, 808-15 (3d Cir. 2000) (equivalent of foster care creates special relationship, but facts of particular case did not shock the conscience or show deliberate indifference).

Our court today considers pivotal the distinction between exposing the child to new dangers and returning her to old ones. *Supra* at 4. Similarly, in *K.H.* Judge Posner recognized a right of children in state custody not to be handed over to abusive care givers, but distinguished cases where children are delivered back to their own parents. *See K.H.*, 914 F.2d at 852-53. These distinctions, between new dangers and old and between foster parents and natural parents, are arbitrary. I believe the proper distinction is whether the state actors have so intervened in the child's situation that they can be said to have rescued the child from danger. At that point, the child's fate is in the state's hands, whether it decides to entrust him to stranger or kin, to new dangers or old. "Once the state acts to disturb the current custodial situation and assumes control over a child's life, the state may not create a dangerous condition for the child by knowingly or recklessly turning control of the child over to an abusive person, *even if that person is a parent or other family member*." *Currier v. Doran*, 23 F. Supp.2d 1277, 1281 (D.N.M. 1998) (emphasis added). *Accord Ford v. Johnson*,

899 F. Supp. 227, 233 (W.D. Pa. 1995) ("The fact that the child is placed with a parent as opposed to a foster parent should not change the standards by which social agencies and their employees conduct their investigations. It is important to remember that in the case at bar, Shawntee had not been in the custody of her father, but, rather, had been in the custody of CYS and was placed with her father by the court after a CYS investigation and recommendation."), *aff'd without opinion*, 116 F.3d 467 (3d Cir. 1997). Chief Judge Posner himself reasoned, in a case alleging child abuse by a father, that if the state officers "knowingly placed [the child] in a position of danger, they would not be shielded from liability by the decision in *DeShaney*." *Bank of Illinois v. Over*, 65 F.3d 76, 78 (7th Cir. 1995). This does not mean that the rescuer becomes responsible for later acts of others (that is a separate question), but for his own bad acts — in this case, knowingly exposing a small girl to a convicted child molester.

The defendants in this case did not merely *fail to protect* S.S. from Griffis. Instead, they affirmatively placed S.S. into Griffis's path. The complaint alleges that McMullen, Jacoby, and Barnett were fully aware of the risks to which they were subjecting S.S., but decided that those risks were the "sole responsibility" of S.S.'s father. I believe they were wrong in their legal assessment, as well as their moral one.

III.

The court today further holds that S.S. failed to allege acts sufficiently culpable to establish a violation of her substantive due process rights. The court concedes that

"deliberate indifference, depending on the circumstances and the kind of deliberation and indifference involved, might well shock the conscience." *Supra* at 6 (quoting *County of Sacramento v. Lewis*, 523 U.S. 833, 850 (1998)). The court concludes, however, that S.S. has not pleaded facts amounting to anything more than negligence.

Unlike negligence, "deliberate indifference" requires the actor's knowledge that a substantial risk of serious harm accompanies his course of action. *See Farmer v. Brennan*, 511 U.S. 825, 837 (1994) (to meet "deliberate indifference" standard, prison official must know of and disregard excessive risk to inmate's health or safety); *Davis v. Monroe County Bd. of Educ.*, 526 U.S. 629, 648 (1999) (school officials are "deliberately indifferent" to sexual harassment of one student by another only when their response to it "is clearly unreasonable in light of the *known* circumstances") (emphasis added).

S.S's complaint alleges that the defendants' actions evince a "deliberate and conscious indifference to the Plaintiff's safety and well-being and violate S.S.'s constitutional right to be reasonably safe from harm." The alleged facts show the defendants knew many facts indicating that S.S. was at risk. McMullen knew that S.S.'s father had exposed his daughter to a known sex offender (evidenced by the anonymous telephone call she received, Dr. Sisk's psychiatric evaluation, the anonymous child abuse hotline call of July 1996, and Griffis's own complaints that his access to S.S. had been unfairly limited), while Jacoby documented her awareness of S.S.'s inappropriate sexual behaviors, S.S.'s complaints of pain in her genital area, various telephone calls

to the Division that warned of Griffis's presence, and sexual abuse by S.S.'s father. More significantly, the allegations in the complaint imply that McMullen consciously appreciated the risk and chose to put S.S. in harm's way. McMullen herself wrote that she and her supervisor decided "that if something happens to S. because he [the father] knows what Joell [sic] has done in the past that he will be solely responsible." In his dissent in *Kitzman-Kelley v. Warner*, 203 F.3d 454, 461 (7th Cir. 2000), Chief Judge Posner hypothesized just this situation as a clear case of liability, in contrast to the mere negligence shown in the case before him: "It is not as if [the defendants] had entrusted [the child] to someone whom they knew to have a record as a child molester; that would be an example of conscious indifference to an obvious danger . . . ."

Whether the defendants' deliberate indifference shocks the conscience presents a separate but related question. *Lewis* explored the continuum of "deliberately indifferent" conduct and held that "[d]eliberate indifference that shocks [the conscience] in one environment may not be so patently egregious in another." 523 U.S. at 850. Substantive due process therefore demands "an exact analysis of circumstances before any abuse of power is condemned as conscience shocking." *Id. Lewis* placed particular importance upon the state defendant's ability to actually deliberate upon his conduct before undertaking it. *Id.* at 851. Therefore, the reckless police pursuit of a fleeing motorist in *Lewis* did not "shock the conscience" when injuries were caused thereby, *id.* at 854, nor does a jailer's deliberately indifferent response to a prison riot establish an Eighth Amendment claim. *Id.* Prison officials' "deliberate indifference" toward a pretrial

detainee's medical needs, on the other hand, can indeed implicate substantive due process. *Id.* at 851-52. Such liability "rests upon the luxury enjoyed by prison officials of having time to make unhurried judgments, upon the chance for repeated reflection, largely uncomplicated by the pulls of competing obligations." *Id.* at 853.

I believe that the defendants' conduct in this case resembles the actionable deliberate indifference of prison officials more closely than the non-actionable recklessness of police officers who pursue fleeing suspects at high speeds through crowded cities. Unlike the police officers in *Lewis*, the defendants faced no split-second decision in determining S.S.'s custody. To the contrary, S.S.'s complaint recounts the defendants' reflections upon the risk to which they willfully subjected S.S. The court's conscience should most certainly be shocked by the complaint before us. I therefore would reverse the dismissal of S.S.'s complaint.

Accordingly, I respectfully dissent.

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS,
EIGHTH CIRCUIT.

APPENDIX B — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT DATED AND FILED JULY 21, 1999

UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

No. 98-1732

S.S., by and through her Next Friend and guardian ad litem, Ellen D. Jervis,

Plaintiff – Appellant,

v.

Michelle McMullen; Sherry Jacoby; Kathleen Barnett;

Defendants – Appellees,

Cynthia M. Montgomery, Ph.D.,

Defendant.

Appeal from the United States District Court for the Western District of Missouri.

Submitted: September 24, 1998
Decided: July 21, 1999

Before WOLLMAN, JOHN R. GIBSON, and MORRIS S. ARNOLD, Circuit Judges.

Appendix B

JOHN R. GIBSON, Circuit Judge.

In this 42 U.S.C. § 1983 action, S.S., now an eight-year-old girl, appeals the district court's dismissal of her claims against the defendants. S.S. alleged that three employees of the Missouri Division of Family Services violated her substantive due process right to bodily integrity, or, as she terms it, "to be reasonably safe from harm." Her complaint charged that the defendants placed S.S. in her father's custody while knowing that her father associated with a convicted pedophile — Joel Griffis — to whom S.S. might be exposed. Some three months after the defendants recommended that custody of S.S. be transferred to her father, S.S. was sodomized by Griffis. Five months later, S.S. filed this lawsuit through her next friend and guardian ad litem, Ellen D. Jervis. Relying upon *DeShaney v. Winnebago County Department of Social Services*, 489 U.S. 189 (1989), the district court dismissed S.S.'s suit. We reverse and remand for further proceedings.

Because we are considering a motion to dismiss, we must accept as true the facts alleged in S.S's complaint. *Haberthur v. City of Raymore*, 119 F.3d 720, 723 (8th Cir. 1997). While not quite three years old, S.S. was taken into the Division's protective custody in January 1994. Several occurrences led to the transfer of S.S. to the Division's custody. For instance, S.S.'s father[1] had allegedly smeared human feces onto her face. Further, S.S. had been locked in her bedroom for periods of time by her parents and was sexually abused by an unknown person. The authorities had also substantiated

1. In order to shield S.S.'s identity, we have avoided referring to her father by name.

several child abuse hotline calls regarding the parents' neglect of S.S. On April 5, 1994, the Circuit Court of Cass County, Missouri, placed S.S. in the Division's permanent custody for placement in foster care.

Defendants Michelle McMullen and Sherry Jacoby are social workers in the Division and were assigned to S.S.'s case in February and May of 1994, respectively. Defendant Kathleen Barnett supervised both McMullen and Jacoby at all times relevant to this lawsuit; she received and approved all dictation, correspondence, and written reports regarding S.S. While S.S. was in the Division's custody, McMullen permitted S.S.'s father to visit S.S. under McMullen's supervision. Griffis was present during three of these visits: July 18, 1995, August 18, 1995, and August 25, 1995.

The defendants later learned that Griffis was a child molester and that he presented a danger to S.S. First, McMullen received an anonymous phone call on September 20, 1995, stating that a man named "Joel" had been convicted of numerous sex offenses and had "been around" S.S. and her father. Second, McMullen learned from numerous sources that S.S.'s father had allowed contact between Griffis and S.S. on nine occasions between October 1995 and August 1996. Third, in May 1996, McMullen received a copy of a psychological evaluation of S.S.'s father. In it, Dr. Gregory Sisk expressed concern that returning S.S. to her father's custody might endanger her welfare. Specifically, Dr. Sisk stated that a child in S.S.'s father's care "could be at risk of abuse/neglect due to his beliefs about child rearing"; that the father "seems dangerously sympathetic with a known child sexual offender, which would appear to be a very risky behavior"; and that "plans toward reunification should

proceed cautiously." Fourth, in July 1996, McMullen became aware of an anonymous child abuse hotline call stating that S.S. "had a rash 'down there' [and] that there is also a man who hangs around the household that S.S. calls grandpa and that he used to be a child molester." Although McMullen investigated this allegation by questioning S.S. at day care and visually examining her genital area, she neither contacted law enforcement authorities nor arranged to have S.S. examined by a medical professional. Fifth, McMullen received a telephone call from Griffis on August 13, 1996. During the call, Griffis stated that it was unfair for the Division to limit his contact with S.S.

Jacoby was similarly aware of S.S.'s peril. She documented her awareness of the anonymous call to McMullen that warned the Division about Griffis's presence. Further, she was aware of a telephone call from S.S's foster mother to the Division on June 20, 1995. The foster mother stated that, ". . . S. told her over and over that she humps with her daddy, Jon." Jacoby also knew that S.S. had exhibited inappropriate sexual behaviors on at least three occasions. Other telephone calls informed Jacoby that S.S.'s father permitted Griffis to be in S.S.'s presence. Finally, Jacoby knew on December 19, 1995, that S.S. had a yeast infection and complained of "hurting in her vagina area."

Already having permitted S.S.'s father to have unsupervised visits with his daughter, McMullen, Jacoby, and Barnett permitted S.S. to live with her father on a full-time "extended visit" basis starting March 8, 1996. S.S. remained on this basis until McMullen — just eight days after Griffis's phone call and three months after Dr. Sisk's report — requested the Cass County Circuit Court to release

S.S. from State custody and to return legal custody to the child's father. On August 22, 1996, the court granted McMullen's request, returned S.S. to her father, and released the child from the court's jurisdiction. McMullen's dictation of that day's events states that she and her supervisor (Barnett) decided "that if something happens to S. because he [the father] knows what Joell [sic] has done in the past that he will be solely responsible."

The next February, a call to a Jackson County child abuse hotline alleged that Griffis had sexually molested S.S. on November 15, 1996, and January 15, 1997. Both incidents occurred during times that S.S.'s father had allowed Griffis to live with him and S.S. Griffis was charged with two counts of first-degree statutory sodomy in Jackson County and two counts in Cass County. S.S.'s father was charged with four counts of felony child endangerment in Jackson County. As a result of the abuse that she suffered, S.S. was hospitalized for one week. She remained institutionalized at a Kansas City psychiatric facility when her guardian ad litem filed the instant complaint.

Relying upon *DeShaney v. Winnebago County Department of Social Services*, 489 U.S. 189 (1989), the district court granted defendants' motion to dismiss the complaint. The court held that S.S. lacked a substantive due process right to be protected from Griffis by the defendants, who are state employees.[2] This appeal followed. Because

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2. The district court also dismissed S.S.'s procedural due process claim against the defendants. S.S. contended that Missouri statutory law sets out mandatory procedures that social workers and the Division must follow, giving rise to a liberty interest in personal safety. S.S. does not appeal this aspect of the district court's ruling.

the defendants in this case did not merely "fail to protect" S.S. from Griffis, we reverse the judgment of the district court.

I.

A complaint should be dismissed under Fed.R.Civ.P. 12(b)(6) only if, taking the allegations as true, "it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations." *Hishon v. King & Spalding*, 467 U.S. 69, 73 (1984). We review *de novo* the question of whether S.S.'s complaint states a viable claim. *See Haberthur v. City of Raymore*, 119 F.3d 720, 723 (8th Cir. 1997). We hold that it does.

A.

Both plaintiff and defendants rely primarily upon *DeShaney* and its progeny in this and other circuits. This reliance is misplaced because it obscures the affirmative nature of the defendants' misconduct. Nevertheless, our inquiry must commence with *DeShaney*.

DeShaney's central holding is that state actors generally have no due process obligation to protect private parties from other private parties. 489 U.S. at 195-97. *DeShaney* involved the substantive due process claim of a boy (Joshua) who had been subjected to repeated beatings by his father. *Id.* at 192-93. When Joshua was treated at a hospital for bruises and abrasions, the Department of Social Services recommended that the boy be placed in the hospital's temporary custody. *Id.* at 192. Three days later, a "Child

Protection Team" (consisting of Department caseworkers among others) determined that there was insufficient evidence of child abuse and that Joshua should be returned to his father's custody. *Id.* The *DeShaney* plaintiffs did not challenge or otherwise attack this determination. Later, caseworkers from the Department continued to monitor the DeShaney home, observed numerous suspicious injuries, and were twice informed of such injuries by emergency room personnel, but took no action to protect Joshua from his father. *Id.* at 192-93. Eventually, Joshua was beaten so severely that he suffered severe brain damage and was rendered profoundly retarded. *Id.* at 193. Joshua and his mother sued the defendants for failing to protect Joshua from his father, but the Court held that the defendants had no duty to protect the child under the Due Process Clause. *Id.* at 195-97, 202.

Two related considerations distinguish the present case from *DeShaney*. First, the *DeShaney* plaintiffs did not attack the state's decision to transfer custody back to Joshua's father after the child's temporary emergency custody in the hospital. *DeShaney* offers no suggestion that the transfer itself was unwise, much less unconstitutional, given the defendants' knowledge at the time of the transfer.[3] Rather, the plaintiffs based their constitutional claim upon the state's conduct after

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3. Indeed, the *DeShaney* plaintiffs conceded that the State played no part in creating the danger that Joshua faced. *See id.* at 197. There is obviously no such concession in the present case. *See also DeShaney ex rel. First v. Winnebago County Dept. of Social Servs.*, 812 F.2d 298, 303 (7th Cir. 1987) ("There is no evidence that the Department was reckless in returning Joshua to the custody of his father back in January 1983.").

the state had relinquished custody of the child. *DeShaney* rejected this claim, for "while the State may have been aware of the dangers that Joshua faced in the free world, it played no part in their creation, nor did it do anything to render him any more vulnerable to them. That the State once took temporary custody of Joshua does not alter the analysis, for when it returned him to his father's custody, it placed him in no worse position than that in which he would have been had it not acted at all." *Id.* at 201. Because the above language may not describe *all* custody transfers, *DeShaney* did not categorically remove custody transfers from the set of cognizable due process claims. *See, e.g., Camp v. Gregory*, 67 F.3d 1286, 1294 (7th Cir. 1995) (child placed in guardianship of state has due process right not to be placed with custodian whom state knows will fail to supervise child adequately), *cert. denied*, 517 U.S. 1244 (1996); *K.H. ex rel. Murphy v. Morgan*, 914 F.2d 846, 852 (7th Cir. 1990) (recognizing right of child in state custody not to be handed over to foster parent or other custodian whom state knows or suspects to be child abuser); *Ford v. Johnson*, 899 F. Supp. 227, 233 (W.D. Pa. 1995) (state actors may be liable for transfer of custody back to child's parent if defendants were at least "deliberately indifferent" to danger of abuse by parent), *aff'd without opinion*, 116 F.3d 467 (3d Cir. 1997). *DeShaney* does not foreclose the possibility that the present defendants — unlike those in *DeShaney* — did in fact create the danger that ultimately harmed S.S. or that they "render[ed] [her] more vulnerable to" that danger.

More generally, *DeShaney* limits the state's duty to protect its citizens from each other. It says little or nothing about the state's duty not to harm its citizens — the sort of

violation alleged by S.S. Joshua's complaint based a substantive due process claim upon the defendants' "*failing to intervene to protect him* against a risk of violence at his father's hand of which they knew or should have known." *Id.* at 193 (emphasis added). As such, his claim failed, for "[t]he most that can be said of the state functionaries in this case is that they stood by and did nothing when suspicious circumstances dictated a more active role for them." *Id.* at 203. In stark contrast, S.S. does not merely allege that the state failed to protect her from Griffis; rather, the defendants affirmatively placed S.S. in Griffis's path despite their knowledge of the threat he posed.

B.

Notwithstanding the general rule that the government has no duty to protect its citizens, *DeShaney* and its progeny have set out two exceptions: the "special relationship" theory and the "state-created danger" theory. Under the former, the state has a duty to protect an individual under its care, custody, or control when the state has removed one's ability to care for oneself. *See DeShaney*, 489 U.S. at 199-201 (although state may bear affirmative duties when it "takes a person into its custody and holds him there against his will," Joshua's injury occurred while in his father's custody; state actors not liable for failing to protect Joshua, despite having earlier taken temporary custody of him); *Norfleet ex rel. Norfleet v. Arkansas Dept. of Human Servs.*, 989 F.2d 289, 293 (8th Cir. 1993) (prison not sole setting in which state must safeguard an individual's civil rights); *Dorothy J. v. Little Rock School Dist.*, 7 F.3d 729, 732 (8th Cir. 1993) (restrictive custodial relationship may create state's duty to

protect individual from private harm, but state-mandated school attendance held insufficiently restrictive to do so). Under the "state-created danger" theory of liability, a duty to protect emerges after the state affirmatively places an individual in a position of danger that the individual would not otherwise have faced. *See, e.g., Greer v. Shoop*, 141 F.3d 824, 827-28 (8th Cir. 1998); *Gregory v. City of Rogers*, 974 F.2d 1006, 1010 (8th Cir. 1992) (en banc), *cert. denied*, 507 U.S. 913 (1993); *Wells v. Walker*, 852 F.2d 368, 369-70 (8th Cir. 1988), *cert. denied*, 489 U.S. 1012 (1989).

For the same reason that *DeShaney* does not control the present case, its two exceptions are also of limited relevance. Eighth Circuit precedent has consistently read the two *DeShaney* exceptions as just that, *i.e.*, as exceptions to the rule that the government has no duty *to protect* private individuals from other private individuals. In this circuit, the "special relationship" and "state-created danger" theories define the state's affirmative duty to protect people, not its more basic duty to refrain from endangering them. Significantly, in a number of decisions (one before and several after *DeShaney*) we have recognized the state's "duty to protect" when it affirmatively places an individual in a position of danger that he or she would not otherwise have been in, or when it assumes a custodial or other "special" relationship with an individual. *See Wells*, 852 F.2d at 370 ("Circuit court decisions examining whether a particular individual . . . *is entitled to protection by the state from third-party harm* generally recognize that the due process clause may be implicated in the following situations: First, when a 'special custodial or other relationship created or assumed by the state' exists . . . or second, when the state affirmatively

places a particular individual in a position of danger the individual would not otherwise have been in.") (emphasis added); *Gregory*, 974 F.2d at 1010 ("We have held that the Due Process Clause imposes a *duty on state actors to protect or care for citizens* in two situations: first, in custodial and other settings in which the state has limited the individuals' ability to care for themselves; and second, when the state affirmatively places a particular individual in a position of danger the individual would not otherwise have faced.") (emphasis added); *Carlton v. Cleburne County*, 93 F.3d 505, 508 (8th Cir. 1996) (same); *Davis v. Fulton County*, 90 F.3d 1346, 1350-51 (8th Cir. 1996) ("As a general rule, the Fourteenth Amendment does not impose any duty on states to *protect its (sic) citizens against violence inflicted by private actors* . . . . *DeShaney* recognizes an exception to this rule, however. A duty to protect an individual exists where she is in a special custodial or other setting in which the state has limited her ability to care for herself . . . . A *duty to protect* has also been recognized in the circuit courts when the state affirmatively places a particular individual in a position of danger that she would not otherwise have faced.") (emphasis added) (internal citations omitted).

1.

To the extent that S.S. predicates her lawsuit upon the defendants' "failure to protect" her from Griffis, her claims meet with only limited success. First, S.S.'s reliance upon the "special relationship" theory is unavailing. Although the state has a constitutional obligation to protect certain individuals under its care, that duty cannot extend beyond

the existence of the "special relationship" in question. Because the "special relationship" itself creates the state's duty to protect, the duty cannot outlive the relationship. Thus, custody is generally a prerequisite to any "special relationship"/duty to protect claim. *See, e.g., DeShaney*, 489 U.S. at 201 (no "special relationship" because child's injuries occurred while he was in father's custody rather than state's); *Norfleet*, 989 F.2d at 293 (state's obligation to provide medical care to asthmatic child arose because of "special custodial relationship" that state assumed when it placed child in state-run foster care setting). S.S.'s claim fails because Griffis sodomized her almost three months after the state relinquished custody of her. S.S. attempts to distinguish *DeShaney* by contrasting her two and one-half year period of state custody with the three-day temporary custody that the state had over Joshua DeShaney. *See DeShaney*, 489 U.S. at 201. This distinction is not relevant to the "special relationship" theory. The state's lengthy custodial relationship with S.S. may indeed bear upon whether the defendants acted recklessly or whether their actions "shock the judicial conscience" — *see* Part II B, *infra* — but it cannot extend the state's "duty to protect" beyond the relationship that created that duty.

2.

By contrast, S.S.'s complaint threads an elusive needle and states a viable claim under the "state-created danger" theory, which recognizes the obligation of state actors to subsequently *protect* an individual after they have created a danger to the individual's well-being. *See, e.g., Davis v. Fulton County*, 90 F.3d 1346, 1350-51 (8th Cir. 1996). Such

liability is entirely distinct from whatever liability may attach for the creation of the relevant danger in the first place. *See* Part II, *infra*. Thus, defendants may be liable both for creating the danger that Griffis would sexually abuse S.S. and for failing to protect S.S. once they created that danger. At this early stage, we cannot determine the extent of defendants' liability under a "state-created danger" theory. Further proceedings might establish, for example, the particular protective measures that defendants might have undertaken once S.S.'s father took custody of S.S. Thus, because it is far from "clear that no relief could be granted under any set of facts that could be proved consistent with the allegations," *Hishon v. King & Spalding*, 467 U.S. 69, 73 (1984), we conclude that S.S. has stated a viable claim under the "state-created danger" theory.[4]

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4. Appellees argue that the "state-created danger" theory does not apply because they neither created the danger faced by S.S. nor placed her in a worse position than if they had not assigned custody to her father. Specifically, they contend, S.S. was never sexually abused while in state custody even though she was on numerous occasions entrusted to her father's unsupervised care and subjected to Griffis's presence. Because Griffis had contact with S.S. both before and after the child's release from state custody, the change in custody "did not trigger any greater or new danger than existed prior to her release." Appellees' Br. at 15.

We are not persuaded. First, we conclude that the complaint did in fact allege that S.S. was abused by Griffis prior to the transfer of custody. The child abuse hotline call to McMullen, for instance, stated that "S. had a rash down there," and that "there is also a man who hangs around the household that S.S. calls grandpa and that he used to be a child molester." McMullen acted upon the phone call

(Cont'd)

Appendix B

II.

A.

This case primarily concerns S.S.'s right not to be injured by the state — essentially a "negative liberty" — a right which both pre-dates *DeShaney* and is broader than S.S.'s right to be protected by the state, the "positive" liberty that *DeShaney* limited. *See K.H. ex rel. Murphy v. Morgan*, 914 F.2d 846, 848-49 (7th Cir. 1990):

> This is not a "positive liberties" case, like *DeShaney*, where the question was whether the Constitution entitles a child to governmental protection against physical abuse by his parents or by other private persons not acting under the direction of the state. The Supreme Court agreed with this court that there is no such entitlement. Here, in contrast, the state removed a child from

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(Cont'd)
by visually examining S.S.'s genital area. These allegations suggest not only that McMullen suspected that Griffis was sexually abusing the child, but also that Griffis had in fact done so. Second, the complaint, liberally construed, suggests that S.S.'s release from state custody may have facilitated Griffis's sexual abuse of her. Indeed, the defendants documented their concerns about S.S. when they warned her father during the custody transfer that he would be "solely responsible" for any harm that Griffis might bring. Dismissal is appropriate only if it appears beyond a reasonable doubt that S.S. can prove no set of facts which would entitle her to relief. *See Whisman v. Rinehart*, 119 F.3d 1303, 1308 (8th Cir. 1997). We therefore must reject the appellees' argument that they did not create or enhance the danger that Griffis posed.

> the custody of her parents; and having done so, it could no more place her in a position of danger, deliberately and without justification, without thereby violating her rights under the due process clause of the Fourteenth Amendment than it could deliberately and without justification place a criminal defendant in a jail or prison in which his health or safety would be endangered, without violating his rights . . . under the cruel and unusual punishments clause . . . if he was a convicted prisoner, or the due process clause if he was awaiting trial.

(citations omitted). One may have a right not to be harmed by the state, a negative liberty, in circumstances that present no right to the state's protection from one's fellow citizens, a positive liberty. *See Pinder v. Johnson*, 54 F.3d 1169, 1177 (4th Cir.) (en banc) ("When the state itself creates the dangerous situation that resulted in a victim's injury, . . . [t]he state is not merely accused of a failure to act; it becomes much more akin to an actor itself directly causing harm to the injured party."), *cert. denied*, 516 U.S. 994 (1995); *Bowers v. DeVito*, 686 F.2d 616, 618 (7th Cir. 1982) ("There is a constitutional right not to be murdered by a state officer, . . . [b]ut there is no constitutional right to be protected by the state against being murdered by criminals or madmen.").[5]

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5. If the Due Process Clause prohibits a state actor from "intentionally harming an individual physically without justification," then "[t]he extension [of this principle] to the case in which the plaintiff's mental health is seriously impaired by deliberate and unjustified action is . . . straight-forward." *See Camp v. Gregory*, 67 F.3d 1286, 1293 (7th Cir. 1995) (quoting *K.H.*, 914 F.2d at 848).

For example, although "the State does not become the permanent guarantor of an individual's safety by having once offered him shelter," *DeShaney*, 489 U.S. at 201, state actors who rescue children then injure them may not defend on the ground that they had no duty to rescue the children in the first place. "The state, having saved a man from a lynch mob, cannot then lynch him, on the ground that he will be no worse off than if he had not been saved .... [T]he absence of a duty to rescue does not entitle a rescuer to harm the person whom he has rescued." *K.H.*, 914 F.2d at 849. *See also Pinder*, 54 F.3d at 1176 n.* ("creation" of danger implicates alternative section 1983 liability framework rather than either of *DeShaney*'s two exceptions, but courts should proceed with caution);[6] *Wood v. Ostrande*r, 879 F.2d 583, 591-95 (9th Cir. 1989) (denying qualified immunity defense to substantive due process claim, where woman was raped after officer impounded her car and left her alone in known high-crime area), *cert. denied*, 498 U.S. 938 (1990).

Therefore, even though children have no substantive due process right to be protected from abusive parents, the state may not itself subject children to abuse by knowingly

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6. *Pinder* would limit liability for the state's "affirmative acts" to cases in which the state actor directly injures the plaintiff, rather than cases in which the state's acts permit a third party to harm the plaintiff. *See* 54 F.3d at 1176 n.*. Rather than erecting a bright-line rule, we think the better approach to cases such as the one before us is to ask whether the state actor proximately caused the plaintiff's injury notwithstanding the third party's position in the causal chain. Indeed, both *Martinez v. California*, 444 U.S. 277, 285 (1980) and *Doe v. Wright*, 82 F.3d 265, 268 (8th Cir. 1996), suggest how courts might approach the question of proximate cause in such section 1983 cases.

delivering them into the hands of abusive caregivers. *See, e.g., Camp v. Gregory*, 67 F.3d 1286, 1294 (7th Cir. 1995) (child placed in guardianship of state has due process right not to be placed with custodian whom state knows will fail to supervise child adequately, where child was later killed after becoming involved in gang activity); *K.H.*, 914 F.2d at 852 (recognizing right of child in state custody not to be handed over to foster parent or other custodian whom state knows or suspects to be child abuser)[7]; *Ford v. Johnson*, 899 F. Supp. 227, 233 (W.D. Pa. 1995) (state actors may be liable for transfer of custody back to child's parent if defendants were at least "deliberately indifferent" to danger of abuse by parent), *aff'd without opinion*, 116 F.3d 467 (3d Cir. 1997).

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7. Although *K.H.* recognizes a right of children in state custody not to be handed over to abusive caregivers, Judge Posner's opinion exempts state actors from liability in cases where children are delivered back to their own parents. *See* 914 F.2d at 852-53. Like other courts that have considered *K.H.*'s distinction between placement with a parent and placement with someone else, we find the distinction unpersuasive. *See Ford v. Johnson*, 899 F. Supp. 227, 233 (W.D. Pa. 1995) ("The fact that the child is placed with a parent as opposed to a foster parent should not change the standards by which social agencies and their employees conduct their investigations. It is important to remember that in the case at bar, Shawntee had not been in the custody of her father, but, rather, had been in the custody of CYS and was placed with her father by the court after a CYS investigation and recommendation."), *aff'd without opinion*, 116 F.3d 467 (3d Cir. 1997); *Currier v. Doran*, 23 F. Supp.2d 1277, 1281 n.3 (D.N.M. 1998). For that matter, as *Currier* points out, Judge Posner himself appears to have since disavowed his position. In dictum, he stated that *DeShaney* would not bar liability if state actors were to place a child in a dangerous position by taking her to her father's house in violation of a court order. *See Bank of Illinois v. Over*, 65 F.3d 76, 78 (7th Cir. 1995).

Appendix B

The defendants in this case did not merely *fail to protect* S.S. from Griffis. Rather, they affirmatively placed S.S. into Griffis's path. McMullen, Jacoby and Barnett were fully aware of the risks to which they were subjecting S.S. but apparently decided that those risks were the sole responsibility of S.S.'s father. To be sure, it is not always easy to distinguish cases in which the state has merely failed to protect its citizens from those in which it has affirmatively injured them. We are mindful of "the tenuous metaphysical construct which differentiates sins of omission and commission," *see White v. Rochford*, 592 F.2d 381, 384 (7th Cir. 1979), but *DeShaney* itself compels us to distinguish the state's affirmative misdeeds from its unfortunate omissions, to differentiate misfeasance from nonfeasance: "The [Due Process] Clause is phrased as a limitation on the State's power to act, not as a guarantee of certain minimal levels of safety and security." 489 U.S. at 195. The defendants in this case have transgressed the limitations — not the obligations — that the Due Process Clause imposes on state actors. They are a "doer of harm rather than merely an inept rescuer, just as the Roman state was a doer of harm when it threw Christians to the lions." *K.H.*, 914 F.2d at 849.

B.

Having concluded that *DeShaney* does not defeat S.S.'s claim, our analysis is not complete. Whether seeking to recover for the defendants' affirmative misdeeds (the transfer of custody to S.S.'s father) or for their failure to protect her after those misdeeds (the "state-created danger" theory), S.S. must still establish the elements that govern any substantive due process claim brought under section 1983. First, the

defendants must have acted with the requisite degree of culpability. *See Daniels v. Williams*, 474 U.S. 327, 330-31 (1986) (negligence insufficient, but leaving open recklessness or gross negligence); *County of Sacramento v. Lewis*, __ U.S. __, 118 S. Ct. 1708, 1718 (1998) (leaving open recklessness or gross negligence); *Sellers ex rel. Sellers v. Baer*, 28 F.3d 895, 902-03 (8th Cir. 1994) (gross negligence insufficient), *cert. denied*, 513 U.S. 1084 (1995); *Gregory v. City of Rogers*, 974 F.2d 1006, 1012 (8th Cir. 1992) (en banc) (reserving question of minimum level of culpability), *cert. denied*, 507 U.S. 913 (1993).[8] Second, because she challenges official actions rather than a legislative pronouncement, S.S. must establish that the defendants' conduct shocks the conscience. *See Lewis*, 118 S. Ct. at 1717 and n.8; *id.* at 1724 (Scalia, J., concurring). Third, she must prove that the defendants proximately caused her injuries. *See Brower v. County of Inyo*, 489 U.S. 593, 599 (1989); *see also Martinez v. California*, 444 U.S. 277, 285 (1980); *Doe v. Wright*, 82 F.3d 265, 268 (8th Cir. 1996).

Unlike negligence, "deliberate indifference" requires one's knowledge that a substantial risk of serious harm accompanies one's course of action. *See Farmer v. Brennan*,

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8. "Deliberate indifference" does not meaningfully differ from willful recklessness, *i.e.*, wherein the actor responds unreasonably to a substantial and known risk rather than to a risk of which the actor merely should have known. *See Farmer v. Brennan*, 511 U.S. 825, 836-39 (1994) (equating "deliberate indifference" with subjective or criminal recklessness). By contrast, so-called "civil recklessness" or "gross negligence" may exist when the risk of harm is so obvious that the actor should have known about it even if he or she did not actually know about it. *Id.* at 836 and n.4.

511 U.S. 825, 837 (1994) (prison official must know of and disregard excessive risk to inmate's health or safety); *Davis v. Monroe County Bd. of Educ.*, __ U.S. __, 119 S. Ct. 1661, 1674 (1999) (school officials are "deliberately indifferent" to student-on-student sexual harassment only when their response to it "is clearly unreasonable in light of the *known* circumstances") (emphasis added). S.S's complaint alleges that the defendants' actions evince a "deliberate and conscious indifference to the Plaintiff's safety and well-being and violate S.S.'s constitutional right to be reasonably safe from harm." J. App. 6, 8, 11. The alleged facts amply support this charge. McMullen knew that S.S.'s father had subjected his daughter to a known sex offender (evidenced by the anonymous telephone call she received, Dr. Sisk's psychiatric evaluation, the anonymous child abuse hotline call of July 1996, and Griffis's own complaints that his access to S.S. had been unfairly limited), while Jacoby documented her awareness of S.S.'s inappropriate sexual behaviors, S.S.'s complaints of pain in her genital area, various telephone calls to the Division that warned of Griffis's presence, and sexual abuse by S.S.'s father. Finally, McMullen herself wrote that she and her supervisor decided "that if something happens to S. because he [the father] knows what Joell [sic] has done in the past that he will be solely responsible."[9]

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9. The dissent argues that the defendants' actions amount to nothing more than gross negligence. To the contrary, the social workers knew the precise danger that faced S.S. if custody were returned to her father. Not only were they "aware of facts from which the inference could be drawn that a substantial risk of harm exists," but they also drew the inference itself. *See Farmer*, 511 U.S. at 837.

Appendix B

Whether the defendants' deliberate indifference shocks the conscience presents a separate but related question. *Lewis* explored the continuum of "deliberately indifferent" conduct and held that "deliberate indifference that shocks [the conscience] in one environment may not be so patently egregious in another." 118 S. Ct. at 1718.[10] Substantive due process therefore demands "an exact analysis of circumstances before any abuse of power is condemned as conscience-shocking." *Id.* at 1718-19. *Lewis* placed particular importance upon the state defendant's ability to actually deliberate upon his conduct before undertaking it. *Id.* at 1719. Therefore, the reckless police pursuit of a fleeing motorist in *Lewis* did not "shock the conscience" when injuries were caused thereby, *id.* at 1720, nor does a jailer's deliberately indifferent response to a prison riot establish an Eighth Amendment claim. *Id.* Prison officials' "deliberate indifference" toward a pretrial detainee's medical needs, on the other hand, can indeed implicate substantive due process. *Id.* at 1718-20. Such liability "rests upon the luxury enjoyed by prison officials of having time to make unhurried judgments, upon the chance for repeated reflection, largely uncomplicated by the pulls of competing obligations." *Id.* at 1720.

We conclude that the defendants' conduct resembles the actionable deliberate indifference of prison officials more

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10. *Lewis* was decided two days before the defendants' brief was filed and seventeen days before the reply brief was filed. Although the case is not discussed in the parties' briefs and although no Fed. R. App. P. 28J letter has been filed with the court, *Lewis* points to the analysis that is required to assess S.S.'s substantive due process claim.

closely than the non-actionable recklessness of police officers who pursue fleeing suspects at high speeds through crowded cities. Unlike the police officers in *Lewis*, the defendants faced no split-second decision in determining S.S.'s custody. To the contrary, S.S.'s complaint recounts the defendants' reflections upon the risk to which they willfully subjected S.S. The allegations paint a picture that shocks the conscience of the court sufficiently to survive a motion to dismiss. First, Defendants caused injury to a well-recognized right of S.S.: her bodily integrity. *See Albright v. Oliver*, 510 U.S. 266, 272 (1994) (bodily integrity is among the fundamental rights implicated by substantive due process); *Lewis*, 118 S. Ct. at 1717 n.8 (whether conduct is conscience-shocking "may be informed by a history of liberty protection . . ."); *id.* at 1722 (Kennedy, J., concurring) ("History and tradition are the starting point . . . of the substantive due process inquiry."). Second, despite their obligations to safeguard S.S.'s best interests,[11] the defendants knowingly exposed her to a risk of sexual abuse and determined that S.S.'s father (not themselves) would be "solely responsible" if the child fell victim to Griffis's predations. Under these circumstances, we cannot conclude that "it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations," *Hishon v. King & Spalding*, 467 U.S. 69, 73 (1984), and we therefore reverse the dismissal of S.S.'s complaint.

Appellees have raised no issue of whether the defendants proximately caused S.S.'s injuries. Likewise, we need not

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11. *See* Mo. Rev. Stat. § 211.011 (1995) ("The child welfare policy of this state is what is in the best interest of the child.").

consider whether the appellees might be shielded from liability by absolute or qualified immunity — a question briefed by the parties below but left unresolved by the district court.

III.

For the foregoing reasons, the judgment of the district court is reversed, and the case is remanded for further proceedings consistent with this opinion.

MORRIS SHEPPARD ARNOLD, Circuit Judge, dissenting.

As the court notes, the decisions of the United States Supreme Court, and our own cases as well, erect numerous hurdles to a recovery by S.S. against these defendants. I pass over the difficulty of comprehending exactly what DeShaney requires when it speaks of distinguishing between acting and not acting, because I do not think that the complaint in this case lays out a case for anything more than gross negligence on the defendants' part. The court, moreover, does not explain why the defendants' deliberate indifference would render them liable, or, indeed, what the difference between gross negligence and deliberate indifference might be. Finally, although what the defendants are said to have done here may be grossly negligent, I cannot say that their acts shock the conscience in the constitutional sense. At most, the defendants exposed S.S. to a risk of personal and physical harm. If this is enough to make out a due process claim, then I cannot see how any complaint that alleges facts amounting to gross negligence or recklessness can ever fail to survive a motion to dismiss.

I therefore respectfully dissent from the court's holding in this case.

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS,
EIGHTH CIRCUIT

APPENDIX C — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF MISSOURI, WESTERN DIVISION DATED AND FILED FEBRUARY 4, 1998

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF MISSOURI
WESTERN DIVISION

Case No. 97-0608-CV-W-SOW

S.S., by and through her Next Friend and guardian ad litem, Ellen D. Jervis,

Plaintiff,

v.

MICHELLE McMULLEN, et al.,

Defendants.

ORDER

Before this Court are defendants McMullen, Jacoby and Barnett's Motion to Dismiss, plaintiff's Opposition and defendants' Reply. For the reasons discussed below, defendants' Motion is granted and this case is dismissed.

I. *Standard*

When considering a motion to dismiss, an assumption must be made that all the facts alleged in the complaint are true and a dismissal may be granted "only if it is clear that no relief can be granted under any set of facts that could be

proved consistent with the allegations." *Alexander v. Peffer*, 993 F.2d 1348, 1349 (8th Cir. 1993) (citation omitted). A motion to dismiss should not be granted "unless it appears beyond a doubt that the plaintiff can prove no set of facts . . . which would entitle plaintiff to relief." *Fusco v. Xerox Corp.*, 676 F.2d 332, 334 (8th Cir. 1982) (citation omitted).

II. *Background*

Plaintiff S.S., born February 21, 1991, was taken into protective custody by the Cass County office of the Missouri Division of Family Services ("DFS") in January 1994. The allegations were that plaintiff had human feces smeared on her face by her father; she was locked in her bedroom for periods of time by her parents; and she had been sexually abused by an unknown perpetrator. The family previously had several substantiated child abuse hotlines for neglect.

On April 5, 1994, the Circuit Court of Cass County, Missouri, placed S.S. in the custody of the DFS for placement in foster care. Defendant McMullen, a DFS social worker, was assigned to plaintiff's case in February 1994. In May 1994, defendant Jacoby, a DFS social worker, was also assigned to plaintiff's case. Defendant Barnett was McMullen and Jacoby's supervisor. Defendant Cynthia Montgomery, who has not joined in this motion, was employed by DFS as a contract therapist.

Plaintiff's father, Jon Spindle, was allowed supervised visits with plaintiff. Joel Griffis, a friend of Jon Spindle, was present during some of those visits. Both defendants McMullen and Jacoby were aware of Joel Griffis' contact with S.S. during those supervised visits.

Appendix C

Defendant Jacoby knew of the foster mother's telephone call on June 20, 1995, in which she stated that ". . . S. told her over and over that she humps with her Daddy, Jon." Defendant Jacoby was also aware of S.S.'s inappropriate sexual acting out behavior.

On September 20, 1995, defendant McMullen received an anonymous telephone call informing her "that a man named Joel who has been convicted of numerous sex charges has been around [S.S.] and her father Jon Spindle." Defendant Jacoby documented knowledge of the anonymous telephone call received by her office regarding Griffis' history as a pedophile on September 21, 1995.

Plaintiff's father was allowed unsupervised visits with plaintiff from October 6, 1995, until March 1996. In March of 1996, DFS sent S.S. to live full-time with her father on an "extended visit," although she was still legally in the DFS custody. Defendant McMullen was informed by various sources that the father had allowed contact between Griffis and S.S. Defendant Jacoby received a telephone call from S.S.'s foster parent on October 6, 1995, telling her that Joel Griffis was with Spindle when he picked up S.S. for her unsupervised visit. Defendant Jacoby also knew that S.S. had contact with Griffis during Thanksgiving weekend in November 1995 and on January 10, 1996.

On May 7, 1996, defendant McMullen received a copy of a Dr. Gregory Sisk's psychological evaluation of Spindle, conducted at the request of DFS. Dr. Sisk's report states that "[h]e seems dangerously sympathetic with a known child sexual offender, which would appear to be very risky

behavior." Dr. Sisk's report further states that ". . . plans toward reunification should proceed cautiously." Spindle had, on February 27, 1996, told defendant McMullen that he did not think Griffis' contact with his daughter was a problem.

On December 19, 1995, defendant Jacoby knew that S.S. had a yeast infection and was complaining of ". . . hurting in her vagina area." On July 1, 1996, defendant McMullen was aware of an anonymous child abuse hotline alleging that ". . . S. had a rash 'down there' that there is also a man who hangs around the household that S.S. calls grandpa and that he used to be a child molester." Defendant McMullen questioned S.S. at her day care and visually examined her "vagina area," stating that ". . . I saw nothing."

On August 13, 1996, Joel Griffis called defendant McMullen. Griffis told McMullen that it was unfair to limit his contact with S.S.

On August 21, 1996, defendant McMullen and her supervisor, defendant Barnett, decided ". . . that if something happens to S. because he [her father] knows what Joell has done in the past that he will be solely responsible." On that same day, defendant McMullen requested that the Court release S.S. from the custody of the State and return her to the legal custody of her father. The Circuit Court of Cass County followed the recommendation of defendant McMullen and DFS. S.S. was returned to the legal custody of her father and released from the Court's jurisdiction on August 22, 1996.

On February 5, 1997, a child abuse hotline was received in Jackson County, Missouri, alleging that on at least two

occasions Griffis had sexually molested S.S. The alleged dates were November 15, 1996 and January 15, 1997. Plaintiff S.S. was placed in protective custody of the Missouri Division of Family Service by the Jackson County office on February 11, 1997.

After an investigation, Joel Griffis was charged with two counts of 1st degree statutory sodomy in Jackson County and with two counts of statutory sodomy in Cass County. Plaintiff's father, Jon Spindle, was charged with four counts of felony endangerment of a child in Jackson County. As a result of the abuse, S.S. was hospitalized at Charter Hospital for approximately one week, and at the time the Complaint was filed, was institutionalized at a psychiatric treatment facility in Kansas City, Missouri.

III. *Discussion*

Plaintiff S.S. alleges that defendants McMullen, Jacoby and Barnett deprived her of her constitutional right to be reasonably safe from harm in violation of the due process clause of the Fourteenth Amendment. Defendants McMullen, Jacoby and Barnett argue that plaintiff's allegations do not give rise to a due process claim and they are protected from liability by absolute and qualified immunity.[1]

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1. Because this Court finds that plaintiff's allegations do not give rise to a due process claim, it is unnecessary to discuss whether defendants would be protected from liability by absolute or qualified immunity.

Appendix C

A. *Substantive Due Process*

Relying on *DeShaney v. Winnebago County, Dept. of Social Services*, 489 U.S. 189 (1989), defendants assert that they "had no substantive due process duty to protect plaintiff from harm through her father's neglect or abuse." Def. Reply 1. Plaintiff argues that "[p]laintiff's substantive due process right to personal safety was created when the state affirmatively exercised its power and removed the child from the custody of her parents." Pl. Opp. 2. Relying on *Norfleet v. Arkansas Dept. of Human Services*, 989 F.2d 289 (8th Cir. 1993), plaintiff asserts that this case is not controlled by *DeShaney* because the state actually took custody of plaintiff and then placed plaintiff in a position of danger.

The United States Supreme Court held in *DeShaney* that:

> [w]hile the State may have been aware of the dangers that Joshua faced in the free world, it played no part in their creation, nor did it do anything to render him any more vulnerable to them. That the State once took temporary custody of Joshua does not alter the analysis, for when it returned him to his father's custody, it placed him in no worse position than that in which he would have been had it not acted at all; the State does not become the permanent guarantor of an individual's safety by having once offered him shelter. Under these circumstances, the State had no constitutional duty to protect Joshua.

DeShaney, 489 U.S. at 201. The Court explained that "[t]he affirmative duty to protect arises not from the State's knowledge of the individual's predicament or from its expression of intent to help him, but from the limitation which it has imposed on his freedom to act on his own behalf. *Id.* at 200.

Plaintiff attempts to distinguish *DeShaney* from the present case, because DFS only took temporary custody of Joshua DeShaney before returning him to the custody of his father, while S.S. was placed in permanent custody of DFS for over two and a half years before she was returned to the legal custody of her father. Another distinction between this case and *DeShaney* is that in *DeShaney* petitioners conceded the state did not play a role in creating the danger. *Id.* at 197.

The cases plaintiff cites in support of her claim involve abuse that occurred while the children were in the custody of DFS and placed in foster care. The Supreme Court left this issue open in *DeShaney*. *DeShaney*, 489 U.S. at 201, n. 9 ("Indeed, several Courts of Appeals have held, by analogy to *Estelle* and *Youngberg*, that the State may be held liable under the Due Process Clause for failing to protect children in foster homes from mistreatment at the hands of their foster parents. . . . We express no view on the validity of this analogy, however, as it is not before us in the present case.")

In *Norfleet*, the Eighth Circuit Court of Appeals held that ". . . a special custodial relationship . . . was created by the state when it took Taureen from his caregiver and placed

him in foster care." *Norfleet*, 989 F.2d at 293. The Court further stated that "the Due Process Clause imposes a duty on state actors to protect or care for its citizens in two situations: first, in custodial and other settings in which the state has limited the individual's ability to care for themselves (custodial cases); and second, when the state affirmatively places a particular individual in a position of danger the individual would not otherwise have faced (state-created danger cases)." *Id.* at 293 (quoting *Gregory v. City of Rogers, Ark.*, 974 F.2d 1006, 1010 (8th Cir. 1992)).

Plaintiff does not allege that she was abused while she was visiting her father and still in state custody. This would be a very different case if she had. The alleged abuse occurred after she was returned to her father's custody and she no longer had a custodial relationship with the state. Based on the reasoning in *DeShaney*, there was not, therefore, a special relationship between S.S. and the state. This Court fails to see how the distinction between the state taking permanent custody versus temporary custody prior to returning the child to the custody of her father changes the *DeShaney* analysis. The foster care cases cited by plaintiff also fail overcome the holding in *DeShaney* and support that a special relationship existed between S.S. and the state.

Plaintiff also asserts that the state placed plaintiff in a position of danger. In *DeShaney*, petitioners conceded the state did not play a role in creating the danger. *DeShaney*, 489 U.S. at 197. In state-created danger case, the issue is whether the state affirmatively placed plaintiff in a position of danger she would not otherwise have faced. *Norfleet*, 989 F.2d at 293.

Appendix C

DFS received several hotline calls regarding plaintiff. An argument can be made that the state's actions placed plaintiff in a greater position of danger or vulnerability because the state interfered with any potential rescue by private persons. Those individuals who would have come to plaintiff's aid were deterred from taking action. They were under the belief that once they reported their concerns to the state, the state would protect plaintiff from harm. Under this reasoning, plaintiff was in greater danger than the general public because the state's perceived action prevented her from receiving help she would have otherwise received.

The flaw with this reasoning is that private persons concerned with the welfare of plaintiff do not have the power to protect her from her father. The private individuals who made hotline calls took the only action they had to protect plaintiff. Also, under this reasoning, every case in which the state took custody and then returned the child to the custody of the parents who then abused the child would result in a due process claim. The Supreme Court held in *DeShaney* that ". . . the State does not become the permanent guarantor of an individual's safety by having once offered him shelter." *DeShaney*, 489 U.S. at 201. Because this Court finds that the state did not place S.S. in a position of danger she would not otherwise have faced, it is unnecessary to discuss whether defendants' conduct met the required showing of culpability.

B. *Procedural Due Process*

Defendants argue that the state statutes do not provide plaintiff with a substantive right to remain free from abuse, or a clearly definable benefit, but merely provide the

procedure to followed when an allegation of abuse occurs. Plaintiff asserts that because Missouri Revised Statutes §§ 210.115[2] and 210.145.5[3] set out mandatory procedures to be followed by social workers and the Division of Family Services, S.S. has a protected liberty interest in personal safety.

The United States Supreme Court has held that:

> [w]e examine procedural due process questions in two steps: the first asks whether there exists a liberty or property interest which has been

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2. Section 210.115 provides in part:

> When . . . [a] social worker . . . has reasonable cause to suspect that a child has been or may be subjected to abuse or neglect or observes a child being subjected to conditions or circumstances which would reasonably result in abuse or neglect, that person shall immediately report or cause a report to be made to the division in accordance with the provisions of sections 210.109 to 210.183.

3. Section 210.145.5 provides in part:

> Upon receipt of a report, which, if true, would constitute a violation of . . . or an attempt to commit such crime, the local office shall contact the appropriate law enforcement agency and provide such agency with a detailed description of the report received. In such cases the local division office shall request the assistance of the local law enforcement agency in all aspects of the investigation of the complaint. . . .

> interfered with by the State; [and] the second examines whether the procedures attendant upon that deprivation were constitutionally sufficient. . . . [A]n individual claiming a protected interest must have a legitimate claim of entitlement to it. Protected liberty interest may arise from two sources — the Due Process Clause itself and the laws of the State.

Kentucky Dept. of Corrections v. Thompson, 109 S.Ct. 1904, 1908 (1989) (citations omitted). The Supreme Court has further stated that:

> [p]rocess in not an end in itself. Its constitutional purpose is to protect a substantive interest to which the individual has a claim of entitlement . . . State may choose to require procedures for reasons other than protection against deprivation of substantive rights, of course, but in making that choice the State does not create an independent substantive right.

Olim v. Wakinekona, 103 S.Ct. 1741, 1748-49 (1983).

Does state law give plaintiff a legitimate claim of entitlement in a benefit that the state cannot deprive plaintiff of without due process of law? Missouri's child abuse statutes seek to promote and balance competing interests. "The child protection system shall seek to promote the safety of children and the integrity and preservation of their families . . ." Mo. Rev. Stat. § 210.109.2. The statute sections cited by plaintiff, §§ 210.115 and 210.145.5, address reporting and investigative procedures. These statutes are not sufficient to

create a liberty or property interest, because they only give plaintiff an expectation that certain procedures will be followed. The statutes do not require a particular substantive result or give plaintiff a legitimate claim of entitlement in a benefit. *See Myers v. Morris*, 810 F.2d 1437, 1469 (8th Cir. 1987) (Minnesota statute does not create a liberty interest in the family unit.); *Doe v. Hennepin County*, 858 F.2d 1325, 1329 (8th Cir. 1988) (Minnesota statute does not create a liberty interest in the family unit or a property interest in social services.); *Tony v. Childers*, 71 F.3d 1182, 1186 (6th Cir. 1995) (Kentucky child protection statutes do not create a due process liberty interest.); and *Doe v. Milwaukee County*, 903 F.2d 499 (7th Cir. 1990) (Wisconsin child abuse reporting statute does not create a property interest).

Plaintiff cites *Taylor v. Ledbetter*, 818 F.2d 791 (11th Cir. 1987) in support of her argument that plaintiff has a protected liberty interest in personal safety. In *Taylor*, the Eleventh Circuit Court of Appeals held that:

> the Georgia scheme mandates that officials follow guidelines and take affirmative actions to ensure the well being and promote the welfare of children in foster care. These children can state a claim based upon deprivation of a liberty interest in personal safety when the officials fail to follow this mandate.

Id. at 799. In *Taylor*, the mandatory procedures in the foster care statutes sought to promote one substantive result or benefit, safety of children in foster homes. Missouri's child abuse statutes establish reporting and investigative

procedures to be followed but do not seek to promote only one result or benefit. The child abuse statutes ". . . seek to promote the safety of children and the integrity and preservation of their families . . ." Mo. Rev. Stat. § 210.109.2. Because the statutes do not require a particular substantive result and only give plaintiff an expectation that certain procedures will be followed, plaintiff cannot have a legitimate claim of entitlement in a benefit.

IV. *Conclusion*

This case is unsettling. Beyond the discussion of legal claims is a sadness, a sadness for the suffering of a little girl and a sadness for the system that could not protect her. We as a society should be upset by her story, but our desire to hold someone responsible does not create a due process claim.

It is hereby

ORDERED that defendants McMullen, Jacoby and Barnett's Motion to Dismiss (doc. # 11) is granted. It is further

ORDERED that, based on the same reasoning, the claim against defendant Montgomery is also dismissed.

s/ Scott O. Wright
SCOTT O. WRIGHT
Senior United States District Judge

February 4th, 1998.

Supreme Court, U.S.
FILED
JAN 8 2001
OFFICE OF THE CLERK

(2)

No. 00-946

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2000

S.S., BY AND THROUGH HER NEXT FRIEND AND GUARDIAN AD LITEM, ELLEN D. JERVIS,

PETITIONER,

v.

MICHELLE MCMULLEN, SHERRY JACOBY, AND KATHLEEN BARNETT,

RESPONDENTS.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

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BRIEF OF *AMICUS CURIAE* CHILDREN'S LAW CENTER OF MINNESOTA IN SUPPORT OF PETITIONER

LAURIE J. MILLER
Counsel of Record
Fredrikson & Byron, P.A.
1100 International Centre
Minneapolis, MN 55402
(612) 347-7000
Counsel for Amicus Curiae Children's Law Center of Minnesota

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Judith G. McMullen, The Inherent Limitations of After-the-Fact Statutes Dealing with the Emotional and Sexual Maltreatment of Children, 41 Drake L. Rev. 483, 494 (1992) (citing James Garbarino and Gwen Gilliam, Understanding Abusive Families, 13 (1980)) 18

INTEREST OF THE *AMICUS CURIAE* AND SUMMARY OF THE ARGUMENT

Amicus Curiae Children's Law Center of Minnesota ("CLC") is a non-profit organization whose mission is to promote the rights and interests of all children in the judicial, child welfare, health care and education systems.[1] As set forth in the accompanying written consent forms, counsel for both Petitioner and Respondent have consented to the submission of this amicus brief. CLC carries out its mission in two ways: (1) by providing direct representation for children in the foster care system; and (2) by advocating for and participating in state and national efforts to reform and improve the child protection and juvenile justice systems.

Children have rights and legal protections, but they are not self-supporting. They need someone, first, to help them understand how their lives can be better and, second, to speak effectively on their behalf and promote their important interests. The services that CLC provides center on the rights of children to have a voice in their own future and to be secure in their person and environment.

CLC supports the Petition for Writ of Certiorari filed by Petitioner S.S., by and through her Guardian Ad Litem Ellen D. Jervis. CLC submits this brief because of the critical issues at stake for the safety of all children committed to the custody of the state. All states have designed child protection systems to receive and process reports of abuse and neglect of children, taking into custody those children who have been injured and are in danger of re-injury. All states mandate that

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[1] This brief was written entirely by counsel for amicus, as listed on the cover. No outside contributions were made to the preparation or submission of this brief.

individuals in certain professions—doctors, nurses, social workers, teachers, psychologists, and child care workers, among others—report cases of suspected and actual abuse and neglect of children. While the child protection system is not a perfect system, the community has a reasonable expectation that the system will accept reports and respond appropriately to protect children about whom reports are made. A system that ignores, does not investigate, or pays little attention to such reports discourages citizens from continuing to report suspected and actual abuse. Such a situation was described recently in the 1998 Minnesota Legislative Auditor's Report on the child protection system.

Rather than encouraging the protection of vulnerable children, the decision of the Eighth Circuit Court of Appeals in S.S.'s case countenances the return of children to abusive family situations, in derogation of existing federal and state statutory schemes designed to prevent precisely that outcome. For example, since at least 1995, Missouri's child protection system's primary purpose has been to keep children safe, and only secondarily to reunite families when it is safe to do so. *See* Mo. Rev. Stat. § 211.011 (1995). The passage of the federal Adoption and Safe Families Act of 1997, 42 U.S.C. § 671, reaffirms the primary importance of children's safety.

Accepting review of this case will enable the Court to articulate what conscience-shocking acts must be alleged to give rise to a substantive due process claim on behalf of a child in state custody. In most states, the child protection system is closed to public view. Only after a brutal murder or assault of a child in an abusive family situation do the citizens of a state get a glimpse of what occurs behind the iron curtain of confidentiality maintained around state child protection systems. Only then can a community begin an informed debate of what the standards for its child protection system should be.

The dismissal of this case on the pleadings, for failure to state a claim, deprived the plaintiff of the opportunity to discover additional facts that "shock the conscience." For example, would it have made a difference to the outcome if it were known that the child's father was a man married to her mother, but was not her biological father? Or that he did not ask for custody, but that custody was thrust upon him by the county?

S.S. is a young girl who, at the age of 3, was taken into custody by the Missouri Division of Family Services in order to remove her from an abusive family situation. S.S. remained in the state's custody for 2½ years. The Division then decided to return S.S. to the custody of her father, despite having learned in the meantime that S.S.'s father associated with a convicted pedophile and had allowed the pedophile to interact with S.S. while S.S. was in the State's custody. Within three months after the State returned custody to S.S.'s father, the pedophile sexually abused S.S. The abuse traumatized S.S., requiring her to be hospitalized for a week and subsequently institutionalized at a psychiatric facility.

No one reviewing the horrific abuse to which this small child was subjected can fail to be moved and to wonder how a state system, ostensibly designed for her protection, could have exposed her to such harm. Legally, the question presented by S.S.'s Petition is whether the actions taken by the Missouri Division of Family Services employees responsible for S.S. rise to the level of a substantive due process violation actionable under 42 U.S.C. § 1983 and the Fourteenth Amendment. The difficulty of this legal question is apparent from the closely divided opinions of the courts that have so far considered this case. The District Court dismissed S.S.'s complaint, relying upon *DeShaney v. Winnebago County Dep't of Soc. Servs.*, 489 U.S. 189 (1989).

On appeal, the Eighth Circuit Court of Appeals, in a panel opinion, reversed the District Court, holding that *DeShaney* did not bar S.S.'s claims, because here instead of failing to protect a child who was not in state custody, the state affirmatively endangered a child who was in its custody. *See S.S. ex rel. Jervis v. McMullen*, 186 F.3d 1066, 1069-70 (CA8 1999). Subsequently, the Eighth Circuit granted rehearing *en banc* and reversed the panel decision, holding that *DeShaney* did bar S.S.'s claims. *See S.S. ex rel. Jervis v. McMullen*, 225 F.3d 960 (CA8 2000).

CLC believes that denying to children such as S.S. any possibility of stating a constitutional claim represents a denial of substantive due process, as recognized by *DeShaney* and prior Supreme Court precedents. The issues presented by S.S.'s Petition are critical to the hundreds of thousands of children who are taken into State custody each year, in determining the extent of their constitutional rights to be safe and protected while in state custody. In addition to the importance of the constitutional issues presented by this case, the existing split among the Circuit Courts of Appeal warrants accepting S.S.'s Petition to resolve whether a child whom the state affirmatively decides to place with an abusive parent, foster parent, or relative may raise a substantive due process claim for resulting harm.

ARGUMENT

I. CHILDREN WHO FIND THEMSELVES IN STATE CUSTODY ARE ENTITLED TO DUE PROCESS RIGHTS EQUIVALENT TO PRISONERS, PRETRIAL DETAINEES, OR MENTAL PATIENTS.

The adage – our children are our future – though often repeated, is true. As a society, we strive to nurture, educate, and protect our children.

For centuries, our legal system has played a vital role in protecting children. Among other things, the Magna Carta addressed the grievances of the Barons against King John for his abuse of the rights of children who were wards of the state. *See Eugene D. By and Through Olivia v. Karman*, 889 F.2d 701, 712 (CA6 1989) (Merritt, Chief Judge, dissenting), *cert. denied*, 496 U.S. 931 (1990). In more recent times, federal and state governments alike have recognized that in matters relating to the custody or placement of a child, the best interests of the child are paramount. *See e.g.*, CAPTA, 42 U.S.C. § 5101 *et seq.*; AACWA, 42 U.S.C. §§ 620-627, 670-679)(a); Mo. Rev. Stat. § 211.011 (1995); Minn. Stat. § 257.025 (1998); N. D. Century Code § 14-09-06.1. A child's safety takes precedence over reuniting a family, as recognized by such recent legislation.

The importance of children to our society and the protections that the Constitution provides for children have not been lost on the Court, which once stated: "It is the interest of youth itself, and of the whole community, that children be both safeguarded from abuses and given opportunities for growth into free and independent . . . citizens." *Prince v. Commonwealth of Massachusetts*, 321 U.S. 158, 165 (1944) (enforcement of child labor laws to protect children does not infringe religious freedom). In

Prince, the Court further explained: "A democratic society rests, for its continuance, upon the healthy, well-rounded growth of young people into full maturity as citizens, with all that implies." *Id.* at 168.

On a number of occasions, a concern for the safety and well-being of children has influenced the Court's interpretation of the Constitution. For example, although the Court has zealously protected the First Amendment right to free speech, the Court has recognized that the interests of children may provide a basis for a state to restrict those fundamental rights. *See F.C.C. v. Pacifica Foundation*, 438 U.S. 726 (1978); *Ginsberg v. New York*, 390 U.S. 629 (1968).

Similarly, the Court's approach to the Equal Protection Clause as it applies to public education has been heavily influenced by the importance of the education of children. In *Brown v. Bd. of Education*, 347 U.S. 483 (1954), the Court described the critical nature of the state's undertaking to educate children as follows:

> In these days, it is doubtless that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education. Such an opportunity, where the state has undertaken to provide it, is a right which must be made available to all on equal terms.

Id. at 493; *see also Meyer v. Nebraska*, 262 U.S. 390, 400 (1923) (the "American people have always regarded education and [the] acquisition of knowledge as matters of supreme importance"); *Plyler v. Doe*, 457 U.S. 202 (1982) ("By denying these children a basic education, we deny them the ability to live within the structure of our civic institutions, and foreclose any realistic possibility that they will contribute

in even the smallest way to the progress of our Nation"). The Court has recognized, and should continue to recognize, the special place that children have in our society as it interprets the Constitution.

On a number of occasions, the Court has reasoned by analogy to determine whether the Constitution provides substantive due process protection for specific classes of people. For instance, in *Estelle v. Gamble*, 429 U.S. 97, 104 (1976), this Court held that the Eighth Amendment protects prisoners from the deliberate indifference of prison officials to prisoners' medical needs. Then, reasoning by analogy, the Court in *Youngberg v. Romeo*, 457 U.S. 307, 315-16 (1982), addressed a state's treatment of the involuntarily committed, and held: "If it is cruel and unusual punishment to hold convicted criminals in unsafe conditions, it must be unconstitutional [under the Due Process Clause] to confine the involuntarily committed – who may not be punished at all – in unsafe conditions." Extending the analogy further, a year later the Court held that the due process rights of a pretrial detainee are at least as great as the protections afforded convicted prisoners. *City of Revere v. Massachusetts Gen. Hosp.*, 463 U.S. 239, 244 (1983).

There can be no doubt where children fall on this continuum of prisoners, the mentally impaired, and pre-trial detainees. If convicted criminals, pre-trial detainees, and the involuntarily committed all have the constitutional right to have their basic human needs met while in state custody, including reasonable protections of their safety, surely a helpless child rescued by the State from an abusive situation and taken into the State's permanent custody, deserves equal constitutional protection of her safety.

Both the Eighth Circuit's panel decision and its subsequent *en banc* decision acknowledged the Court's

instruction that, in order to infringe substantive due process rights, the alleged state action must "shock the conscience." *See County of Sacramento v. Lewis*, 523 U.S. 833 (1998). Likewise, both Eighth Circuit decisions recognized that the abuse suffered by S.S. was horrendous enough to shock anyone's conscience. However, the *en banc* opinion drew an artificial line between the actions of the state in placing S.S. in the path of an abuser and the resulting abuse itself, in order to conclude that while the latter was shocking, the former was not. No such artificial distinction should be made.

If the State of Missouri, instead of placing S.S. in a home where it expected and anticipated that she would have regular contact with a convicted pedophile, had placed S.S. in the path of an oncoming train, the artificiality of the distinction between the act of placing the child in danger and the harm resulting to the child would be apparent. The state action endangering S.S. is no less shocking than the state actions deemed actionable in *Estelle*, *Youngberg*, and *City of Revere*.

II. *DESHANEY* RECOGNIZED TWO CATEGORIES OF PERMITTED SUBSTANTIVE DUE PROCESS CLAIMS, AND BOTH APPLY HERE.

DeShaney recognized the continuing validity of prior cases holding that substantive due process claims may be raised in certain circumstances, including *Estelle*, *Youngberg*, and *City of Revere*, among others. *DeShaney* categorized cases in which proper substantive due process claims might be brought into two groups: (1) cases where the state has taken a person into its custody and thereby becomes subject to a constitutionally imposed duty of responsibility for the person's safety and general well-being, and (2) cases where the state has created the danger faced by the person or acted

in such a way so as to render the person more vulnerable to danger. 489 U.S. at 198-99.

This case fits within both *DeShaney* exceptions. S.S. was taken into the State's custody, and the State affirmatively placed S.S. in danger and rendered her more vulnerable to that danger by placing her in the path of a known pedophile. To recognize that S.S.'s claims fit within one or both of the long-established substantive due process categories of claims that pre-existed and were reaffirmed by *DeShaney* would not open the floodgates to a series of new and different substantive due process claims. On the other hand, to permit the Eighth Circuit *en banc* opinion to stand may have the chilling effect of cutting off claims even in circumstances that *DeShaney* explicitly recognized as giving rise to proper constitutional claims.

A. The Division's affirmative actions with respect to S.S. meet the criteria for the "state-created danger" exception to *DeShaney*.

Applying *DeShaney*'s "state-created danger" exception, 498 U.S. at 201, a number of circuits have found liability for state action in circumstances similar to S.S.'s.

In *Kneipp v. Tedder*, 95 F.3d 1199 (CA3 1996), the Third Circuit articulated a four-part test for applying the "state-created danger" exception: (1) the harm ultimately caused must be foreseeable and fairly direct; (2) the state actor must act in willful disregard for the safety of the plaintiff; (3) there must exist some relationship between the state and the plaintiff; (4) the state actors must have used their authority to create an opportunity that otherwise would not have existed for the third party's crime to occur. 95 F.3d at 1208. Applying that test, the Third Circuit held that plaintiff stated a constitutional claim by alleging that a police

officer created a danger that she would be injured. The police officer stopped plaintiff and her husband on their way home, knew that she was severely intoxicated and that her husband was helping her get home, allowed her husband to continue home to relieve the babysitter, but detained and then later released plaintiff to continue home unaccompanied by her husband or other helper. *Id.* at 1201-03. Because she was extremely intoxicated and unassisted, Ms. Kneipp did not reach home but instead fell down an embankment, suffering permanent, debilitating injuries. *Id.* at 1203.

More recently, the Third Circuit affirmed a finding that the "state-created danger" exception applied where the state failed to investigate a father's background or to report to the Children and Youth Services agency the existence of an outstanding Protection from Abuse Order against the father that would have disqualified him from being the child's custodian. The state nevertheless returned the child to the father's custody. The child subsequently was beaten to death. *See Ford v. Johnson*, 899 F. Supp. 227 (W.D. Pa. 1995), *aff'd without opinion*, 116 F.3d 467 (CA3 1997). The district court stated, "the fact that a child is placed with a parent as opposed to a foster parent should not change the standards by which social agencies and their employees conduct their investigations." *Id.* at 233. In distinguishing the facts of *DeShaney*, the court emphasized: "It is important to remember that in the case at bar, Shawntee had not been in the custody of her father, but, rather, had been in the custody of CYS and was placed with her father by the court after a CYS investigation and recommendation." *Id.*

The Seventh Circuit also has applied the "state-created danger" exception to children abandoned by state actors who were aware of specific dangers likely to confront the children, even though the state actors did not create the dangers themselves but rather rendered the children more

vulnerable to pre-existing dangers. *See White v. Rochford*, 592 F.2d 381 (CA7 1979).[2] In *White*, the court held that the State may be liable for harm caused to children after police officers arrested the children's uncle for drag racing and then abandoned the children on a freeway where they were subjected to the dangers of inclement weather and traffic. *Id.* The Seventh Circuit explained that under the Due Process Clause's restraint against "undue incursions on personal security" it was sufficient to state a claim by alleging that "the defendants left helpless minor children subject to inclement weather and great physical danger without any apparent justification." *Id.* at 383-84.

On the heels of *DeShaney*, the Ninth Circuit held that the State could be held liable for creating the danger of rape when a police officer left a passenger by the side of the road in a dangerous part of town. *See Wood v. Ostrander*, 879 F.2d 583 (CA9 1989). As the Ninth Circuit explained, "the fact that [the officer] arrested [the driver], impounded his car, and apparently stranded [the passenger] in a high-crime area at 2:30 a.m. distinguishes [the passenger] from the general public and triggers a duty of the police to afford her some measure of peace and safety." *Id.* at 590.

The Ninth Circuit again applied the "state-created danger" exception where a registered nurse was raped by an inmate assigned to work with her in a juvenile custodial facility's health clinic. *See L.W. v. Grubbs*, 974 F.2d 119, 121 (CA9 1992), *cert. denied*, 508 U.S. 951 (1993). In distinguishing the "state-created danger" exception from *DeShaney*'s more generally recognized and applied

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[2] *White* was decided before *DeShaney*, but has continuing validity under the "state-created danger" exception. *White* was not addressed by the *DeShaney* majority though it was referenced by the dissent.

"custodial" exception,[3] the court explained: "The 'danger creation' basis for a claim . . . necessarily involves affirmative conduct on the part of the state in placing the plaintiff in danger." *Id.* Thus, the *Grubbs* court found that the plaintiff nurse stated a claim for violation of Due Process rights where she alleged that:

> the Defendants knowingly assigned Blehm [the inmate] to work with L.W. despite their knowledge that: (1) Blehm was not qualified to serve as cart boy; (2) Blehm had an extraordinary history of unrepentant violence against women and girls; (3) Blehm was likely to assault a female if left alone with her; (4) L.W. would be alone with Blehm during her rounds; and (5) L.W. would not be prepared to defend against or take steps to avert an attack because she had not been informed at hiring that she would be left alone with violent offenders.

Id. at 121. The court explained that, "the Defendants, like the officer in *Wood*, thus used their authority as state correctional officers to create an opportunity for Blehm to assault L.W. that would not otherwise have existed." *Id.*

In stark contrast to the above decisions, the Eighth Circuit's *en banc* decision in this case declined to recognize the State's knowing placement of S.S. in the path of a known pedophile as a "state-created danger" rendering S.S. more vulnerable to the known danger presented by Griffis. Like the child in *Ford*, S.S. had previously been in foster care for a period of two and one half years where she faced little danger

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[3] *See* section II.B. below.

from Griffis. Like the children in *White*, the abandoned passenger in *Wood* and the nurse in *Grubbs*, the danger facing S.S. when the state returned her to her father's custody (i.e., sexual abuse by Griffis) was not "created" by the defendants. Rather, the state's affirmative action of placing S.S. back into her father's care despite knowledge that Griffis, a convicted pedophile, associated with S.S.'s father and occasionally lived in his home, rendered S.S. more vulnerable to known dangers by creating an opportunity for Griffis to harm S.S. that did not exist while S.S. remained in state custody and foster care with supervised visitation. Thus, had S.S.'s case arisen in the Third, Seventh or Ninth Circuits, and perhaps others,[4] S.S.'s claims likely would not have been dismissed.

The Eighth Circuit reversed and dismissed by analogizing S.S.'s case to *DeShaney*. The *en banc* opinion reasoned that the danger faced by S.S. when the state returned to her father's custody was not increased or different from that which she faced before she was removed, because the State "merely placed her back into the situation from which it had originally retrieved her." *S.S.*, 225 F.3d at 962. This analysis is flawed in two ways.

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[4] *See, e.g., Dewares v. City of New York*, 985 F.2d 94 (CA2 1993). In *Dewares*, the Second Circuit found that the plaintiff stated a claim for violation of his Due Process rights where he alleged that police informed "skinheads" at a flag burning demonstration that they would not interfere with the skinheads' assault of demonstrators unless they got "totally out of control." *Id.* at 99. The court found that the State action increased the likelihood that the skinheads would assault demonstrators and made the demonstrators more vulnerable to assault and that the police were in effect complicit in the violence. *Id.* Arguably, defendants' return of S.S. to her father's custody in the face of what they knew about Griffis's past and his exposure to S.S. with the "understanding that if anything happened to S.S. it would be her father's fault" was tantamount to the complicity exhibited by the officers in *Dewares*.

First, the conclusion that S.S. faced the same danger after she was returned to her father's custody as that she faced before she was removed several years earlier is without foundation in the record. The record does not support the conclusion that S.S. was exposed specifically to Griffis and faced possible sexual abuse by him before she was first removed from her father's custody. *See id.*, at p. 965 (stating that S.S. had been removed from her father's custody in 1994 because "S.S.'s father had allegedly smeared human feces onto her face, S.S. had been locked in her bedroom for periods of time by her parents, and she had been sexually abused by an unknown person"). To the contrary, the record shows that the state first became aware of Griffis's association with S.S.'s father *after* S.S. had already been removed from the home. *Id.* (defendants observed Griffis's presence at several supervised visitations during 1995 and "*later* learned that Griffis was a child molester and that he presented a danger to S.S.") (emphasis added). Thus, exposure specifically to Griffis could not have been the danger from which S.S. was originally removed, because the defendants had no awareness of Griffis prior to 1995.

Second, the Eighth Circuit erred and diverged from the approach taken in other circuits by characterizing the state "action" at issue as the entire course of conduct over the several years that S.S. was in the defendants' custody. *See S.S.*, 225 F.3d at 963 ("two and a half years elapsed between the time that S.S. was taken from her father's custody and the time when she was returned to it, but we discern nothing in that interval that created a greater risk of abuse than the one that she would have faced had she never been taken from her father in the first place"). By characterizing the state action as the entire course of the defendants' conduct, the Eighth Circuit collapsed the intervening period of years and compared S.S. before removal to S.S. after she was returned,

ignoring the lower risk S.S. faced from Griffis while she remained in state custody.

Moreover, such a sweeping characterization of "state action" fails to distinguish cases like this one, where the state has been actively and deeply involved with the plaintiff's care over a period of years and has acquired substantial knowledge about specific dangers facing the particular plaintiff, from cases like *DeShaney* where the state intervention was minimal and extremely limited in time. *See DeShaney*, 489 U.S. at 192 (state's involvement limited to temporary custody and an investigation over the course of a few days). By failing to make this distinction, the Eighth Circuit effectively eliminated any accountability for State actions that endanger children, even where the State's files are thick with information acquired over a period of years about specific circumstances and specific dangers.

In other circuits, the state action has been defined with more precision. In *Ford*, on facts very similar to the facts of this case, the state action was defined as the decision to return the child to his father, not the entire period during which the child was in the state's custody. 899 F. Supp. at 232-33. Similarly, in *Wood* and *White*, the state action was defined as the decision to leave the passenger or the children by the side of the road, not the entire scope of the state's intervention by stopping and arresting the respective drivers in those cases. 879 F.2d at 585, 588; 592 F.2d at 383-84.

Applying a more precise definition to the state action in this case would define the action at issue as the defendants' decision to return S.S. to her father's custody. Prior to that decision, S.S. remained in foster care and faced much less threat from her father and Griffis. After the state's decision, S.S. was surely as endangered as a child left by the side of the road, and the known and foreseeable harm to her in fact

resulted. To paraphrase the *Ford* court's opinion, it is important to remember that S.S. "had not been in the custody of her father, but, rather, had been in the custody of [the state]," who affirmatively placed her in Griffis's path despite knowledge of his history as a pedophile. 899 F. Supp. at 233.

As a result of the Eighth Circuit's flawed analysis, the decision in this case diverges from those in other circuits. If the Supreme Court does not act to resolve the conflict and clarify the "state-created danger" exception, plaintiffs, and particularly children, in the Eighth Circuit will be left without a remedy afforded to plaintiffs in other circuits.

B. The State took custody of S.S. for two and one-half years, thereby triggering the custodial exception to *DeShaney*.

Under *DeShaney*'s custodial or "special relationship" exception, parties may obtain relief if they were in the State's custody at the time an injury occurred. It is irrelevant whether the state created any danger itself. The exception provides: "[w]hen the State by the affirmative exercise of its power [takes an individual into custody and] so restrains an individual's liberty that it renders him unable to care for himself, and at the same time fails to provide for his basic human needs, e.g. food, clothing, shelter, medical care and *reasonable safety* – it transgresses the substantive limits on the state action set by the Eighth Amendment and the Due Process Clause." *DeShaney*, 489 U.S. at 200 (emphasis added).

The "special relationship" exception has been used as a basis for relief under the Due Process Clause of the 14th Amendment in a number of cases where children were taken into a state's custody through a state's foster care system. For example, in *Camp v. Gregory*, 67 F.3d 1286, 1294 (CA7

1995), the court held that a child placed in the custody of the state through its child protective services agency has a due process right not to be placed with a custodian whom the state knows will fail to supervise the child adequately. In *K.H. Through Murphy v. Morgan*, 914 F.2d 846, 852 (CA7 1990), the same court held that a child in state custody could not be transferred to a foster parent or other custodian whom the state knows or suspects to be an abuser. *See also Lintz v. Skipski*, 25 F.3d 304, 305 (CA6 1994); *Norfleet By and Through Norfleet v. Arkansas Dep't of Human Servs.*, 989 F.2d 289, 293 (CA8 1993); *Yvonne L. By and Through Lewis v. New Mexico Dep't of Human Servs.*, 959 F.2d 883, 891-93 (CA10 1992).

The basis for relief in the above cases was not that the state created the danger that the children encountered. Instead, the Courts found that the children were in the state's custody when their injuries occurred and that a "special relationship" existed between the children and the state. Therefore, the state had a duty to protect the children from the injuries they received. "The affirmative duty [of the state] to protect [arose] not from the state's knowledge of the [children's] predicament or from its expression of intent to help [them], but from the limitation which it [had] imposed on [their] freedom to act on [their] own behalf." *DeShaney*, 489 U.S. at 200.

The Eighth Circuit, in both its initial and *en banc* decisions below, as well as S.S. in her Petition, erroneously assumed that because S.S.'s injury occurred after the state had released her from its custody, that the "special relationship" exception did not apply. That was not the case. While S.S. was harmed physically by abuse after she was transferred to her father's care, she was also harmed psychologically by the transfer itself. This fact should not be ignored.

Experts have determined that "[e]xcept for a relatively small percentage of cases in which children are in danger of death or permanent physical injury, the most debilitating injuries are emotional." Judith G. McMullen, The Inherent Limitations of After-the-Fact Statutes Dealing with the Emotional and Sexual Maltreatment of Children, 41 Drake L. Rev. 483, 494 (1992) (citing James Garbarino and Gwen Gilliam, Understanding Abusive Families, 13 (1980)). "Thus, whereas children can generally absorb and overcome the experience of physical assault or sexual abuse if they are psychologically strengthened, they can rarely do so if they are psychologically mistreated as part of the experience." James Garbarino, et al., The Psychologically Battered Child, 9 (1986).

In this case, S.S. may claim psychological injury from the custody transfer itself, regardless of the sexual abuse she endured after the transfer occurred. The decision to transfer custody was made while S.S. remained in the state's custody, and it therefore had an affirmative duty to protect her. The state should not be allowed to discharge its duty of protection and wash its hands of any responsibility where it has knowingly decided to place the child in a hazardous situation. That duty should not be discharged simply by the state's decision to release her. *See Williams v. Wasserman*, 937 F. Supp. 524, 527 (D. Md. 1996). Accordingly, the state's transfer of S.S. to her father violated the Due Process clause of the 14th Amendment, because the transfer itself caused psychological harm to S.S. Removing S.S. from the safe environment in which she had lived for over 2 1/2 years, and exposing her to the danger known to exist in S.S.'s father's home, in and of itself caused significant psychological harm.

Several cases addressing international child custody issues under the provisions of the Hague Convention support the conclusion that returning children to an environment in

which they had been physically harmed itself causes psychological harm. For example, in *Application of Blondin v. Dubois*, 78 F.Supp.2d 283, 291 (S.D.N.Y. 2000), the court determined that removing children from a home where they were beginning to feel safe and secure and returning them to France, the country in which they had been abused, *even if they were not returned to the abuser himself*, would expose the children to "a grave risk of psychological harm." *Id.* The Court concluded that "the primary trauma is the removal and the uncertainty and the lack of security that comes from leaving where they are now and going back to the scene of the original trauma [France]." *Id.*

Likewise, in *Rodriguez v. Rodriguez*, 33 F.Supp.2d 456, 461 (D. Md. 1999), the psychologist examining children who had been physically and emotionally abused by their father concluded that "the children's only hope of recovery from [the psychological damage] is to be placed in a secure environment. Returning the children to [the scene of the abuse], *even if it did not result in the children's physical abuse at the hand of their father*, would result in psychological trauma . . ." *Id.* (emphasis added).

Steffen F. v. Severina P., 966 F. Supp. 922, 928 (D. Az. 1997), went even further. There the court held that even in the absence of proof of sexual abuse, removal of the child from the United States to Germany after less than a year would likely cause the child severe psychological harm, because such removal would sever the psychological bond the child had developed with his American custodian. *Id.*

S.S. alleged she was abused by her father and his acquaintance during her father's visits before the custody transfer back to her father took place. *S.S.*, 186 F.3d at 1072 n.4. S.S., knowing she was being abandoned by the state's child protection services in order to be returned to the lion's

den with no one to protect her, suffered psychological trauma from the transfer itself as well as the subsequent abuse. Any child being taken from a safe place and left to the care of her known abusers necessarily suffers harm from such a transfer.

S.S.'s psychological trauma is as much an injury to S.S. as the sexual abuse itself and should provide S.S. another basis for relief under the Due Process clause of the 14th Amendment. The "special relationship" exception of *DeShaney* provides another compelling reason to grant S.S.'s Petition.

CONCLUSION

For the above-stated reasons, *Amicus Curiae* Children's Law Center of Minnesota respectfully submits that compelling reasons support granting the petition of S.S. for a writ of certiorari in this matter.

Respectfully submitted,

January 8, 2001

Laurie J. Miller
Counsel of Record
Fredrikson & Byron, P.A.
1100 International Centre
900 Second Avenue South
Minneapolis, MN 55402
Tel. (612) 347-7000
Fax (612) 347-7077

Attorneys for *Amicus Curiae*
Children's Law Center of
Minnesota

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No. 00-946

In the
SUPREME COURT OF THE UNITED STATES

S.S., by and through Her Next Friend and Guardian *Ad Litem*, ELLEN D. JERVIS
Petitioner,

v.

MICHELLE McMULLEN, SHERRY JACOBY, and KATHLEEN BARNETT,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

---

RESPONDENTS' BRIEF IN OPPOSITION TO PETITIONER'S PETITION FOR WRIT OF CERTIORARI

JEREMIAH W. (JAY) NIXON
Attorney General of Missouri

JAMES R. McADAMS
Chief Counsel for Litigation
Counsel of Record
DAVID M. LIEBER
Assistant Attorney General
P.O. Box 899
Jefferson City, MO 65102
(573) 751-3321

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QUESTION PRESENTED

Can a substantive due process claim be stated against state social workers for failing to prevent sexual abuse by a third party that occurred after the child was returned to her father's custody pursuant to a court order?

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RESPONDENTS' BRIEF IN OPPOSITION TO PETITIONER'S PETITION FOR WRIT OF CERTIORARI

INTRODUCTION AND STATEMENT OF THE CASE

More than a decade ago this Court conclusively answered the question presented by this petition. In *DeShaney v. Winnebago County Dept. of Soc. Servs.*, 489 U.S. 189, 201 (1989), this Court held that "the State does not become the permanent guarantor of an individual's safety by once having offered him shelter." The claim raised in the instant petition–that the State, by taking a child into its custody, undertakes an affirmative duty to prevent harm that occurs after such custody is terminated–was explicitly rejected in *DeShaney*, and has not, contrary to petitioner's suggestion, been questioned by any authoritative decision of any other circuit court of appeals. This Court should decline petitioner's invitation to again take up the question it answered in *DeShaney*.

Statement of Facts

For the purposes of this petition, we must assume the truth of the undeniably tragic facts fully set forth in plaintiff's complaint, found in Respondents' Appendix (Resp. App.) at A1-A15. The complaint alleged that in January 1994, when S.S. was almost three years old, she was taken from the custody of her father and placed into the custody of the Missouri Division of Family Services ("Division"). Resp. App. at A2-A3. This action followed allegations that S.S. was physically abused and neglected by her father, and that she was sexually abused by an unknown person. *Id.*

S.S., while in the legal custody of the Division, was gradually returned to the physical custody of her father through a progression of supervised visits, followed by unsupervised visits, which ultimately culminated in her living with her father full-time beginning March 8, 1996. Resp. App. at A3-A5. In

August, 1996, several months after full-time physical custody of S.S. had been transferred to her father, Joel Griffis, a family friend who at an undisclosed time was a child sexual offender, complained that it was unfair that his contact with S.S. was being limited. Resp. App. at A4. Despite the knowledge that S.S. was having contact with Griffis, her treating psychologist recommended, later in August, 1996, that S.S. be returned to the custody of her father. Resp. App. A12-A13. Thereafter, on August 22, 1996, the Circuit Court of Cass County ordered that S.S. be released from its jurisdiction and that legal custody of S.S. be returned to her father. Resp. App. at A5.

The complaint alleges that Joel Griffis sexually abused S.S. on two occasions; the first on November 15, 1996, nearly eight months after her father gained full-time physical custody of S.S. and nearly three months after the court terminated the Division's legal custody. Resp. App. at A5-A6. There is no allegation in the complaint, however, that the sexual abuse of S.S. took place while she was in either the physical or legal custody of the Division. See Pet. App. at 52a ("Plaintiff does not allege that she was abused while she was visiting her father and still in state custody. This would be a very different case if she had."). The cause of action plaintiff pleaded against each defendant was limited to a failure to foresee, and thus prevent, the sexual abuse that took place while the child was in her father's custody: "Defendant failed to exercise professional judgment in pursuing the child's release from the custody and protection of the State because she knew or should have known that the father had not protected and would not protect the child from Joel Griffis and that S.S.'s subsequent sexual molestation was reasonably foreseeable." Resp. App. at A6, A8, A11.

The Decisions Below

Each of the three decisions below recognized, as petitioner does not, that cases holding state officials liable for harm caused by others arise from two distinct and independent lines of reasoning. The first line arises in cases where the state has taken the individual into custody or otherwise limited the individual's ability to care for themselves. See Pet. App. at 52a. But this special custodial relationship liability is limited, as even the panel opinion finding in petitioner's favor noted, to the duration of that relationship:

> S.S.'s reliance upon the "special relationship" theory is unavailing. Although the state has a constitutional obligation to protect certain individuals under its care, that duty cannot extend beyond the existence of the "special relationship" in question. Because the "special relationship" itself creates the state's duty to protect, the duty cannot outlive the relationship.

Pet. App. at 31a-32a.

The second line of authority arises from "state-created danger" cases, in which the state affirmatively places an individual in a position of danger the individual would not otherwise have faced. *See* Pet. App. at 52a. The *en banc* decision below held that the state-created danger doctrine did not apply to the present matter "for the simple reason that in returning S.S. to her father, the state did not increase the danger of significant harm to S.S.: It merely placed her back into the situation from which it had originally retrieved her." Pet. App. at 4a. The dissenting members of the court did not dispute that a distinction must be made between "failure[s] to protect the victim" and "affirmative acts of endangerment," but only

differed with the majority on where the line between action and inaction should be drawn. Pet App. at 14a. Crucially, the dissent does not challenge the key finding of the majority opinion–that the state officials did not increase the danger to S.S. by returning her to the same situation from which it took her. Instead, the dissent argues that the question of whether the state enhanced the danger is unimportant:

> I believe the proper distinction is whether the state actors have so intervened in the child's situation that they can be said to have rescued the child from danger. At that point, the child's fate is in the state's hands, whether it decides to entrust him to stranger or kin, to new dangers or old.

Pet. App. at 16a. Thus, the question that divided the *en banc* court below is whether the state, having once protected a person from danger, thereby assumes a duty under the Constitution to continue that protection indefinitely. *DeShaney* answered that question unambiguously in the negative.

REASONS FOR DENYING THE WRIT

The Eighth Circuit, *en banc*, properly concluded that this case is substantively indistinguishable from *DeShaney*. The conflict petitioner purports to find between the decision below and the decisions of the Seventh and Third Circuits is spurious. The decision of the Seventh Circuit upon which petitioner relies explicitly provides that cases where the state ends its custody of a child by returning the child to its parents cannot give rise to substantive due process liability. The Third Circuit decision on which petitioner relies is completely irrelevant because in that decision–which was issued without opinion–the court was not even presented with the question at

issue here.

In addition, the writ should be denied because the Eighth Circuit, *en banc*, properly concluded, as an independent alternative basis for decision, that the state actors here are accused, at most, of negligently reuniting a child with her father. This allegation falls far short of the kind conscience-shocking abuse of power required to state a claim under this Court's substantive due process jurisprudence.

1. This case is indistinguishable from *DeShaney*

The relevant facts before this Court in *DeShaney* are indistinguishable from those alleged in the complaint below. Like this case, *DeShaney* presented an "undeniably tragic" case of child abuse, for which the child sought to recover from state social services workers. *DeShaney v. Winnebago County Dept. of Soc. Servs.*, 489 U.S. 198, 191 (1989). Joshua DeShaney, like S.S., was approximately three years old when he came to the attention of Wisconsin child welfare authorities. *Id.* at 192. At that time, complaints to police of physical abuse the boy's father inflicted upon him, as well as evidence of physical injuries led the county department of social services to seek and obtain a court order removing the child from his father's custody. *Id.* The county then convened a "Child Protection Team," which decided that the evidence of abuse was insufficient to retain Joshua in the court's custody, but recommended continued monitoring of the child as a protective measure. *Id.* Pursuant to this recommendation, the court terminated its jurisdiction over the boy and returned him to his father's custody. *Id.* During subsequent visits to the boy's home, caseworkers noted suspicious, new injuries to the boy. *Id.* at 192-93. Even after a second emergency room admission, where the medical personnel again indicated that child abuse was likely, the authorities did not take any action. *Id.* at 193.

A little more than a year after the state returned the boy to his father's custody, the father beat him so severely that he fell into a coma and suffered profound, permanent brain damage. *Id.*

This Court, in an analysis precisely followed by the Eighth Circuit here, first addressed the question of whether a special relationship existed between the state social workers and the child. Examining its previous decisions in the context of prisoners and others involuntarily restrained by the state, *see, e.g., Youngberg v. Romeo*, 457 U.S. 307 (1982) (involuntarily committed mental patients); *Estelle v. Gamble*, 429 U.S. 97 (1976) (prisoners), this Court concluded that the affirmative duty of care those decisions recognize is limited to the duration of the custodial relationship. *DeShaney,* 489 U.S. at 200-01. Because the abuse occurred while the boy was not in the state's custody, this Court concluded, the special relationship analysis was inapplicable. *Id.* at 201. The Court then explicitly addressed and rejected the argument that petitioner urges most strongly here:

> While the State may have been aware of the dangers that Joshua faced in the free world, it played no part in their creation, nor did it do anything to render him more vulnerable to them. That the State once took temporary custody of Joshua does not alter the analysis, for when it returned him to his father's custody, it placed him in no worse position than that in which he would have been had it not acted at all; the State does not become the permanent guarantor of an individual's safety by having once offered him shelter. Under these circumstances, the State had no constitutional duty to protect Joshua.

Id.

Petitioner makes no attempt to distinguish *DeShaney* from the present matter. Instead, petitioner suggests, based apparently upon the first sentence of the previously quoted paragraph, that *DeShaney* left "open the question of whether due process rights are violated when the state affirmatively places a child previously in state custody into circumstances that render her more vulnerable and susceptible to danger." Pet. at 8-9. That may be true; but it fails to recognize that in the remainder of the paragraph this Court unambiguously held that the return of a child to his father's custody, which placed the child in no more danger than if the state had not intervened at all, does not amount to the creation of a danger by the state. The same is true here, and the Eighth Circuit properly concluded that *DeShaney* controls the outcome of this case.

2. The decision below does not conflict with the opinion of any other appellate court

Petitioner claims that the Eighth Circuit's decision below conflicts with the decisions of the Seventh and Third Circuits. To find a conflict with the Seventh Circuit, petitioner misrepresents the opinion of the Eighth Circuit. And to find a conflict with the Third Circuit, petitioner puts words in that court's mouth.

Not content to claim that the Seventh Circuit opinion in *K.H. ex rel. Murphy v. Morgan*, 914 F.2d 846 (7th Cir. 1990), is contrary to the present opinion, petitioner asserts that the Eighth Circuit decision concedes that this is the case: "The decision itself admits that 'a leading case involving similar circumstances in another circuit reached a contrary result.'" Pet. at 9. This "admission" is produced by misquoting the opinion below, which actually says: "We are aware that a leading case involving *arguably* similar circumstances in another circuit reached a contrary result, but we think that its

facts serve to distinguish it from our case." Pet. App. at 5a (emphasis added, internal citation omitted). Actually, the two cases differ in a key respect highlighted in *K.H.*

The key fact distinguishing this case from *K.H.* is that in *K.H.* state officials had removed the plaintiff child from her parents' custody and then placed her in the custody of a foster parent who was incompetent to care for her and physically abused her. 914 F.2d at 848-49. Although petitioner suggests that this is a distinction without a difference, it is a distinction that was explicitly recognized as determinative not just in *K.H.* but, more importantly, in *DeShaney* itself. The *K.H.* court carefully distinguishes its decision from cases where the parents were the abusers, which were decided by *DeShaney*:

> This is not a "positive liberties" case, like *DeShaney*, where the question was whether the Constitution entitles a child to governmental protection against physical abuse by his parents or by other private persons not acting under the direction of the state. The Supreme Court agreed with this court that there is no such entitlement. Here, in contrast, the state removed a child from the custody of her parents; and having done so, it could no more place her in a position of danger . . . than it could . . . place a criminal defendant in a . . . prison in which his health or safety would be endangered . . . .

Id. at 848-49 (citing *Estelle v. Gamble*, 429 U.S. 97 (1976)). The court continues that this analysis is sound "even if one concedes, as one must in the light of *DeShaney*, that the State . . . has no constitutional obligation to protect children from physical or sexual abuse by their parents. The state could have left K.H. to the tender mercies of her parents without thereby

violating . . . the Constitution." *Id.* at 849. After finding a right to be free from abusive foster care placements while in state custody, the court re-emphasizes the limits of its holding:

> Certainly if the state decides to return a child whom it has taken custody of to the child's natural parents, those parents do not become state agents. That would undo *DeShaney*. . . . .
>
> . . . . [T]here is indeed a difference between placing a child with a member of her family and placing the child with a foster parent. It is notable in this connection that K.H. does not focus on the return to her parents as a placement for which she seeks damages. The focus is on her placement with a nonrelative foster parent . . . .

Id. 852-53.

That the *K.H.* court makes much of this distinction is unsurprising, since it is explicitly recognized in *DeShaney*: "Had the State by the affirmative exercise of its power removed Joshua from free society and placed him in a foster home operated by its agents, we might have a situation sufficiently analogous to incarceration or institutionalization to give rise to an affirmative duty to protect." 489 U.S. at 201, n.9. Contrary to petitioner's suggestion, *K.H.*, as much as the decision below, recognizes the fundamental difference between taking a child from her parents and placing her in a dangerous situation that she would not have faced but for the state's actions, and simply returning the child to face a danger that she would have faced had the state never intervened.

Nor has the Seventh Circuit questioned this principle in

the other decisions petitioner cites. In *Bank of Illinois v. Over*, 65 F.3d 76 (7th Cir. 1995), the court denied substantive due process liability for injuries caused to a child while in her father's home. The court did note, in dicta, that the child, who was in her mother's sole legal custody, could have stated a claim against state agents if they had delivered her to her father in violation of a court order limiting his visitation to supervised times and places, thus leaving the child exposed to a danger that she would not have faced without their intervention. *Id.* at 77-78. This is fundamentally different from the present situation where S.S. was returned to her father's custody pursuant to a court order and faced no more danger than she would have faced had the state not intervened at all.

Camp v. Gregory, 67 F.3d 1286 (7th Cir. 1995), is also distinguishable. There, the child was, at the time of his death, under the legal guardianship of the state. *Id.* at 1295. Thus, while his physical custody had been returned to his aunt, who had previously been his guardian, the Seventh Circuit held that the continued guardianship by the state imposed a continuing affirmative duty to place the child with appropriate caregivers. *Id.* at 1296-97. Perhaps *Gregory* would conflict with the decision below if the abuse suffered by S.S. had occurred while she was in the state's legal, but not physical custody. But the complaint contains no such allegation. Petitioner's invocation of *Gregory*, *Over* and *K.H.* to support a claim of conflict is without merit.

Petitioner's claim of conflict with the Third Circuit Court of Appeals is even less plausible. Petitioner claims that, "[u]nlike the Eighth Circuit, the Third Circuit has specifically recognized that a custody transfer to a known abusive biological parent caregiver is not an 'inaction' but is instead an affirmative act of endangerment." Pet. at 11. But the Third Circuit's supposed specific recognition of this position is merely an

affirmance, without opinion, of the district court's ruling in *Ford v. Johnson*, 899 F. Supp. 227 (W.D. Pa. 1995), *aff'd* 116 F.3d 467 (1997). Assuming a memorandum affirmance can ever be an endorsement, it could not be in *Ford*. There plaintiff, not the defendant, appealed the decision of the district court dismissing several of her claims. *See* 899 F. Supp. at 234-35 and *Ford v. Johnson*, No. 96-3513, 1997 U.S. App. LEXIS 159301 (3d. Cir. May 21, 1997) (noting the designation of the parties on appeal). The portion of the trial court's ruling refusing to dismiss plaintiff's "state-created danger" claim was apparently never before the Third Circuit.

Moreover, even the words of the District Court for the Western District of Pennsylvania that the Third Circuit "specifically recognized," do not conflict with the decision below. In *Ford*, a child's mother sued on her own behalf and as administratrix of her daughter's estate after the daughter, who had been removed from state custody and placed with her father, was beaten to death by him. 899 F. Supp. at 229. The district court did not clearly answer one question critical to the *DeShaney* analysis: would the girl ever have been in the custody of her father but for the intervention of the state? The court suggests an answer in the negative: "It is important to remember that in the case at bar, Shawntee had not been in the custody of her father, but, rather, had been in the custody of [the state] and was placed with her father by the court after a [state] investigation and recommendation." *Id.* at 233.

Petitioner also asserts conflict with another district court decision, *Currier v. Doran*, 23 F. Supp. 2d 1277 (D.N.M. 1998). But that case is clearly distinguishable because the court answered the *Ford* question by clearly disclosing a critical distinguishing fact. The *Currier* result was different from *DeShaney*, "because [the child] was not originally in his father's custody. Instead, he was removed from one custody situation

and placed with his father by the state. The court finds this a significant difference from *DeShaney*, and one possibly (depending on the facts Plaintiffs might prove) warranting a different result." *Id.* at 1280. *Currier* holds, as *Ford* suggests, that if the child had not previously been in her father's custody, placement with him by the state presented a new danger, not the revival of an old one as in the case at bar.

No published opinion from any court has disagreed with the Eighth Circuit that *DeShaney*, by its unambiguous terms, insulates state actors from liability for the conduct alleged here: relinquishing the physical and legal custody of a child to a parent from which that custody had been temporarily taken. Such an action, as *DeShaney* indicates, leaves the child in no worse position than if the state had never intervened at all, a conclusion which defeats substantive due process liability on a state created danger theory.

3. The conduct alleged here does not rise to the level of egregiousness required for a substantive due process violation

This Court recently examined at some length the level of culpability government officials must possess in order to violate the substantive due process rights of an individual. In *County of Sacramento v. Lewis*, this Court explained that its "cases dealing with abusive executive action have repeatedly emphasized that only the most egregious official conduct can be said to be arbitrary in the constitutional sense" and that "the Due Process Clause was intended to prevent government officials from abusing their power, or employing it as an instrument of oppression." 523 U.S. 833, 846 (1998) (internal citations omitted). Actionable conduct must be that which shocks the conscience in a constitutional sense. *Id.* at 847-48. Thus, this Court noted, it has "rejected the lowest common

denominator of customary tort liability as any mark of sufficiently shocking conduct," and instead has held "that the Constitution does not guarantee due care on the part of state officials; liability for negligently inflicted harm is categorically beneath the threshold of constitutional due process." *Id.* at 848-49. It is extremely egregious conduct, rather, that gives rise to substantive due process violations: "conduct intended to injure in some way unjustifiable by any government interest is the sort of official action most likely to give rise to the conscience-shocking level." *Id.*

Petitioner never contends that state officials returned S.S. to her father with the intention of causing her harm, or with any other malicious motive. Instead, petitioner here urges this Court to adopt a lower standard than intent, specifically the deliberate indifference standard applicable to those with a duty to care for an individual in a custodial context.[1] Petitioner's argument relies on this Court's analysis in *Lewis*. There, this Court held that the deliberate indifference standard was not applicable to a spontaneous police chase because, unlike the case of a custodial prison official, the chasing officer had little opportunity to act with deliberation in considering whether and how to pursue a fleeing suspect. *Id.* at 850-52. Since a state worker deciding whether to reunite a child with her parent does not act in haste, petitioner argues, deliberate indifference is the proper standard to judge the official's conduct.

This argument reads *Lewis* too narrowly. A standard less than intentional conduct is appropriate with respect to providing safety in a custodial setting not merely because decisions may be considered fully, but also because no

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[1] In fact, the complaint alleges no more than negligence in claiming that respondents "knew or should have known" of the danger S.S. faced. See, *infra*, pp. 15-16.

"substantial countervailing interest excuse[s] the State from making provision for the decent care and protection of those it locks up." *Id.* at 851. Where a state worker is charged with deciding whether to maintain state custody of a child at the expense of her parents, substantial competing interests are at work. While the state's concern for the safety and well-being of children is, of course, paramount, it can hardly be said that the interests of the parents, the child and the state in preserving the integrity of families, an interest this Court has identified as a fundamental component of liberty, is not entitled to any consideration. As Judge Posner noted in *K.H.*, these sometimes competing interests impose difficult choices on child welfare workers:

> State employees who withhold a child from her family run the risk of being sued by the family for infringing their liberty of familial association, and we do not want to place child welfare workers on a razor's edge–damned if they return the child to its family and damned if they retain custody of the child and place him in a foster home or institution.

914 F.2d at 853 (internal citations omitted). That S.S. was returned to the custody of her father, as opposed to being placed with a foster family brings this case within the conundrum Judge Posner described. Because of the substantial competing interests at stake, the actions of the state officials who are charged to make such difficult decisions should not be judged to shock the conscience on anything less than allegations of intentionally arbitrary and oppressive behavior.

Even accepting *arguendo* plaintiff's deliberate indifference standard as the proper one here, plaintiff's claim would nevertheless fail, because plaintiff has, at most, pleaded

a cause of action for negligence. The key allegation in plaintiff's complaint is that: "Defendant[s] failed to exercise professional judgment in pursuing the child's release from the custody and protection of the State because [they] knew or should have known that the father had not protected and would not protect the child from Joel Griffis and that S.S.'s subsequent sexual molestation was reasonably foreseeable." Resp. App. at A6, A8, A11. This allegation falls short of the constitutional standard for deliberate indifference. That standard does not permit liability merely because the risk is one that is so obvious that the defendant knew or should have known of it. Rather, the official must be aware not only of the facts from which the inference could be drawn that a substantial risk exists, but the official must in fact have drawn that inference and then disregarded it. *See Farmer v. Brennan*, 511 U.S. 825, 837 (1994). Nothing in plaintiff's complaint, as the court below held, alleges anything more than negligence, and the Eighth Circuit properly determined that defendants' conduct, as alleged, does not shock the conscience in a constitutional sense.

4. Defendants are absolutely immune from suit for recommendations made to the juvenile court

Although neither the Eighth Circuit nor the district court reached the question,[2] certiorari should also be denied because the dismissal of this suit was proper on the independent, alternative basis–that defendants are absolutely immune from suit. As noted above, defendants are being sued for failing to exercise professional judgment in pursuing the release of S.S. from the jurisdiction of the juvenile court. The fact remains, however, that the question of whether to terminate that jurisdiction was not decided by those officials but was adjudicated by a judge in a judicial proceeding. This Court has

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[2] See Pet. App. at 49a, n.1.

held that common law extends absolute immunity to"all persons–governmental or otherwise–who [a]re integral parts of the judicial process" and that § 1983 did not abrogate that doctrine. *Briscoe v. LaHue*, 460 U.S. 325, 335-41 (1983). When a state official appears as a witness, that official is entitled either to the absolute immunity accorded any witness in a judicial proceeding, or, if that official is instead viewed as "an official performing a critical role in the judicial process," then the official should be accorded the same absolute immunity that attaches to judges and prosecutors. *Id.* at 335-36. Like the police officers at issue in *Briscoe*, the defendants here are entitled to absolute immunity, whether they are viewed merely as witnesses in the juvenile court proceeding, or whether they are viewed as state officials exercising a critical role in that judicial proceeding. *See Myers v. Morris*, 810 F.2d 1437, 1466-67 (8th Cir. 1987) (guardians ad litem and other professionals are absolutely immune for recommendations made to family court regarding parental visitation of children suspected of being abused).

****

There is no doubt, as this Court noted in *DeShaney*, that natural human sympathy favors compensating the victims of child abuse. 489 U.S. at 202-03. But as this Court also noted, creating constitutional liability for state officials who must decide whether and when children are to be taken from, or reunited with, their parents, has the potential to distort necessary decisions. *Id.* at 203. The result petitioner seeks here would have the deleterious effect of underprotecting children and their families. State officials would, as an initial matter, have strong incentives to delay removing endangered children from their parents' custody as long as possible, since under petitioner's theory, the state would then become the guarantor of the child's safety indefinitely, whereas taking no action

would avoid all liability. Once the state takes custody, officials would have equally strong incentives never to reunite children with their parents. Because children are generally removed from their parents' custody due to their parents' lack of fitness, reuniting the family would always be legally perilous, as state officials would, by the nature of the situation, have notice that the parents pose some danger to the child. Balancing these important, competing objectives is a job better left, as this Court suggested in *DeShaney*, to the more flexible devices of state tort and family law, than to the amorphous body of substantive due process law.

CONCLUSION

For these reasons, this Court should deny the petition for a writ of certiorari.

Respectfully submitted,

JEREMIAH W. (JAY) NIXON
Attorney General

JAMES R. McADAMS
Chief Counsel for Litigation
Counsel of Record
DAVID M. LIEBER
Assistant Attorney General
P.O. Box 899
Jefferson City, MO 65102
(573) 751-3321

Counsel for Respondents

January 2001

APPENDIX

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Petitioner's Complaint filed in U.S. District Court,
Case No. 97-0608-CV-W-SOW A1

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MISSOURI
WESTERN DIVISION

S.S., by an through her Next Friend and guardian ad litem , Elllen D. Jervis,	)	
Plaintiff,	)	
v.	)	Case No. 97-0608-CV-W-SOW
Michelle McMullen, Sherry Jacoby, Kathleen Barnett, and Cynthia M. Montgomery, Ph.D.,	)	
Defendants.	)	

COMPLAINT

COMES NOW Plaintiff, S.S., a minor, by and through her Next Friend and guardian ad litem, Ellen D. Jervis, and for her cause of action states and alleges as follows:

1. This action arises under 42 U.S.C. § 1983 and the Due Process Clause of the Fourteenth Amendment to The United States Constitution. Jurisdiction of this Court is invoked pursuant to the provisions of 28 U.S.C. § 1343.

2. Venue of this action arises under 28 U.S.C. § 1391 because Plaintiff's claim arose in the Western District of Missouri.

3. Plaintiff was at all times relevant to this lawsuit

a resident of the State of Missouri and a United States citizen.

4. At all times relevant to this lawsuit, Defendant Michelle McMullen was employed as a Division of Family Services social service worker by the State of Missouri. She is being sued individually and in her official capacity.

5. At all times relevant to this lawsuit, Defendant Sherry Jacoby was employed as a Division of Family Services social service worker by the State of Missouri. She is being sued individually and in her official capacity.

6. At all times relevant to this lawsuit, Defendant Kathleen Barnett was employed as a Division of Family Services Supervisor by the State of Missouri. She is being sued individually and in her official capacity.

7. At all times relevant o this lawsuit, Defendant Cynthia Montgomery was employed by the Missouri Division of Family Services as a contract therapist. She is being sued individually and in her official capacity.

COUNT I

For Count I of her Complaint against Defendant McMullen, Plaintiff states and alleges as follows:

8. Plaintiff hereby incorporates by reference as though fully set forth herein paragraph 1 through 7 of Plaintiff's complaint.

9. On or about January 20, 1994, S.S. (born February 21, 1991) was taken into protective custody by the Missouri Division of Family Services' Cass County office. It was alleged that the child, not quite 3 years old, had human

feces smeared on her face by her father, Jon Spindle. It was further alleged that she was locked in her bedroom for periods of time by her parents and that she had been sexually abused by an unknown perpetrator. The family previously had several substantiated child abuse hotlines for neglect.

10. On April 5, 1994, the Circuit Court of Cass County, Missouri placed S.S. in the custody of the Division of Family Services for placement in Foster care.

11. On or about February 2, 1994, Defendant McMullen was assigned to the case. During the father's subsequent visits with S.S., supervised by Defendant McMullen in her capacity as a Division of Family Services Social Service Worker, II, an individual named Joel Griffis, reportedly a friend of the fathers, was present on July 18, 1995, August 18, 1995 and August 25, 1995.

12. On or about September 20, 1995, Defendant McMullen's dictation records reflect her receipt of an anonymous telephone call, . . "stating that a man named Joel who has been convicted of numerous sex charges has been around [S.S.] and her father Jon Spindle."

13. Although now aware that the father's friend was allegedly a convicted pedophile, Defendant McMullen allowed the father to begin having unsupervised visits with S.S. The unsupervised contact was continued by the Defendant although she was informed by various sources that the father had allowed contact between Mr. Griffis and S.S. on October ć, 1995; November 28, 1995; December 18, 1995; January 10, 1996; February 13, 1996; April 12, 1996; July 2, 1996; July 19, 1996; and August 15, 1996.

14. On or about February 27, 1996, the father told

Defendant McMullen that he did not perceive Joel Griffis' contact with his daughter to be a problem.

15. On or about May 7, 1996, Defendant McMullen received a copy of a psychological evaluation conducted on S.S.'s father at the request of the Division of Family Services by Dr. Gregory Sisk, that stated in part that, ". . . children in his care could be at risk of abuse/neglect due to his beliefs about child rearing . . " and that ". . . plans toward reunification should proceed cautiously." Dr. Sisk's report further states, "He seems dangerously sympathetic with a known child sexual offender, which would appear to be a very risky behavior."

16. On or about July 1, 1996, Defendant McMullen was aware of an anonymous child abuse hotline call to her office alleging that ". . . S. had a rash 'down there' that there is also a man who hangs around the household that S.S. calls grandpa and that he used to be a child molester."

Defendant McMullen investigated the report by questioning the child at her day care and visually examining S.'s "vagina area", stating that, ". . . I saw nothing." Defendant never called law enforcement authorities and did not have S.S. examined by a medical professional before the above sexual abuse allegation was found to be unsubstantiated.

17. On or about August 13, 1996, Defendant McMullen received a telephone call from Joel Griffis who stated that it was unfair to limit his contact with S.S.

18. Although aware of the father's repeated failure and refusal to protect S.S. from Joel Griffis, Defendant McMullen allowed the child, a minor in custody of the State Division of Family Services, to have unsupervised visits with the father from approximately October 6, 1995 until March of

1996. On March 8, 1996, the Division (at worker discretion) sent S.S. to live full-time with her father on an "extended visit," although still legally in the Division custody until the child's release from jurisdiction on August 22, 1996.

19. Defendant McMullen requested that the Court release S.S. from the custody of the State and to return her to the legal custody of her father on August 21, 1996. Her dictation on that date states that at a staffing held with her supervisor, they decided, ". . . that if something happens to S. because he [the father] knows what Joell [sic] has done in the past that [sic] he will be solely responsible."

20. On or about August 22, 1996, the Circuit Court of Cass County followed the recommendation of Defendant McMullen and the Division of Family Services and returned S.S. to the legal custody of her father, Jon Spindle. The child was released from the Court's jurisdiction at that time.

21. On or about February 5, 1997, a child abuse hotline was received in Jackson County, Missouri alleging that on at least two occasions, November 15, 1996 and January 15, 1997, Joel Griffis had sexually molested S.S. This included periods of time when the father had allowed Griffis to live with him and S.S. S.S. was again placed in the protective custody of the Missouri Division of Family Services on February 11, 1997, by the Jackson County office.

22. After police investigations in Grandview, Jackson County, Missouri; and Belton, Cass County, Missouri; Joel Griffis was charged with two counts of 1st degree statutory sodomy in Jackson County and with two counts of statutory sodomy in Cass County. The father, Jon Spindle was charged with four counts of felony endangerment of a child in Jackson County.

23. As the result of said abuse, S.S. was hospitalized at Charter Hospital for approximately one week, and is presently institutionalized at a psychiatric treatment facility in Kansas City, Missouri.

24. That Defendant McMullen had an affirmative duty to protect S.S., a child in the State's custody from reasonably foreseeable injury.

25. That the Defendant failed to exercise professional judgment in pursuing the child's release from the custody and protection of the State because she knew or should have known that the father had not protected and would not protect the child from Joel Griffis and that S.S.'s subsequent sexual molestation was reasonably foreseeable.

Further, Defendant McMullen failed to comply with the state statutes including, but not limited to Sections 210.115 and 210.145 R.S.Mo. and Division of Family Services policies regarding the handling and reporting of allegations of sexual abuse while the child was in Division custody.

26. The above-described actions by Defendant McMullen deprived Plaintiff of her Civil Rights and have caused her actual damages.

27. The above-described actions by Defendant McMullen show a deliberate and conscious indifference to the Plaintiff's safety and well-being and violate S.S.'s constitutional right to be reasonably safe from harm, thereby entitling Plaintiff to punitive damages.

WHEREFORE, Plaintiff prays that:

a. This Court declare that Defendant McMullen

was deliberately indifferent to the Plaintiff's safety and liberty interest in violation of the Plaintiff's rights under the Due Process Clause of the Fourteenth Amendment to the United States Constitution;

b. That this Court award Plaintiff actual and punitive damages;

c. That Plaintiff be awarded costs and attorney's fees for this action; and

d. For such other and further relief as this Court deems just and proper.

COUNT II

For Count II of Plaintiff's Complaint against Defendant Jacoby, Plaintiff states and alleges as follows:

28. Plaintiff hereby incorporates by reference as though fully set forth herein paragraphs 1 through 27 of her Complaint.

29. On May 9, 1997, Defendant Jacoby was assigned as a Social Service Worker II on the case of S.S. and her parents.

30. Defendant Jacoby's dictation indicates that she was aware of S.S.'s inappropriate sexual acting out behaviors on at least three occasions; May 21, 1995, June 2, 1995 and July 3, 1995.

31. Defendant Jacoby was aware of the foster mother's telephone call to the Division on June 20, 1995 which stated that, ". . . S. told her over and over that she humps with

her Daddy, Jon."

32. Defendant Jacoby knew that Joel Griffis was present at visits between S.S. and her father on July 18, 1995 and August 25, 1995. Further, she documents knowledge of the anonymous telephone call received by her office regarding Griffis' history as a pedophile on September 21, 1995.

33. Defendant Jacoby concurred with the decision to begin unsupervised visits between the father and S.S. on September 21, 1995. Further, the Defendant received a telephone call from the foster parent on October 6, 1995 telling her that Joel Griffis was with the father when he came to pick up S.S. for her unsupervised visit.

34. Defendant Jacoby was aware that Joel Griffis had been present at the unsupervised Thanksgiving weekend visit in November 1995. Defendant also knew of contact with Mr. Griffis and S.S. on January 10, 1996.

35. That Defendant Jacoby knew on December 19, 1995 that S.S. (a four year old child) had a yeast infection and was complaining of ". . . hurting in her vagina area."

36. That Defendant Jacoby had an affirmative duty to protect S.S., a child in the State's custody from reasonably foreseeable injury.

37. That Defendant Jacoby failed to exercise professional judgment in allowing the child's placement back in the house because she knew or should have known that the father had not protected and would not protect the child from Joel Griffis and that S.S.'s subsequent molestation was reasonably foreseeable.

Further, Defendant Jacoby failed to comply with State statutes including, but not limited to, Sections 210.115 and 210.145 R.S.Mo. and Division of Family Services policies regarding the handling and reporting of allegations of sexual abuse.

38. The above-described actions by Defendant Jacoby deprived Plaintiff of her Civil Rights and have caused her actual damages.

39. The above-described actions by Defendant Jacoby show a deliberate and conscious indifference to the Plaintiff's safety and well-being and violate S.S.'s constitutional right to be reasonably safe from harm, thereby entitling Plaintiff to punitive damages.

WHEREFORE, Plaintiff prays that:

a. This Court declare Defendant Jacoby was deliberately indifferent to the Plaintiff's safety and liberty interests in violation of the Plaintiff's rights under the Due Process Clause of the Fourteenth Amendment to the United States Constitution;

b. That this Court award Plaintiff actual and punitive damages;

c. That Plaintiff be awarded costs and attorney's fees for this action; and

d. For such other and further relief as this Court deems just and proper.

COUNT III

For Count III of Plaintiff's Complaint against Defendant Barnett, Plaintiff states and alleges as follows:

40. Plaintiff hereby incorporates by reference as though fully set forth herein paragraphs 1 through 39 of her Complaint.

41. Plaintiff's child abuse case was assigned to Defendant McMullen in February of 1994 and additionally to Defendant Jacoby in May of 1994, both social workers under direct supervision of Defendant Barnett.

42. All of Social Service Workers' McMullen and Barnett's case files were accessible, and under the direct supervision of Defendant Barnett, as a Social Service Supervisor I. Further, Defendant Barnett received and approved all dictation, correspondence and written reports regarding the Plaintiff during the time that she was in the Division of Family Service's custody from January 20, 1994 until August 22, 1996.

43. Although aware of the father's repeated failure and refusal to protect S.S. from Joel Griffis, Defendant Barnett approved the plan to allow the father unsupervised visitation with S.S. from October 6, 1995 until March of 1996. Defendant Barnett approved the decision to send S.S. to live with her father full-time on an "extended visit" from March 6, 1996 until the child's release from jurisdiction on August 22, 1996.

44. Defendant Barnett concurred with and approved of her worker's request that the Court release S.S. from the custody of the State and at a meeting on August 21, 1996, Defendant Barnett and Defendant McMullen agreed to request S.S.'s release from the Court's jurisdiction and protection. It was decided that ". . . if something happens to S. because he

[the father] knows what Joell [sic] has done in the past that [sic] he will be solely responsible."

45. Although S.S.'s file is replete with evidence and allegations of sexual abuse during the time she was in the custody of the Missouri Division of Family Services, Cass County Division; Defendant Barnett failed to protect the child by properly pursuing hotline investigations and by allowing the unsupervised contact with the father to continue.

46. That Defendant Barnett had an affirmative duty to protect S.S., a child in the State's custody from reasonably foreseeable injury.

47. That Defendant Barnett failed to exercise professional judgment in pursuing the child's release from the custody and protection of the State because she knew or should have known that the father had not protected and would not protect the child from a known pedophile and that S.S.'s subsequent molestation was reasonably foreseeable.

Further, Defendant Barnett failed to comply with State statutes including, but not limited to, Sections 210.115 and 210.145 R.S.Mo. and Division of Family Services policies regarding the handling and reporting of allegations of sexual abuse while the child was in Division custody.

48. The above-described actions by Defendant Barnett deprived Plaintiff of her Civil Rights and have caused her actual damages.

49. The above-described actions by Defendant Barnett show a deliberate and conscious indifference to the Plaintiff's safety and well-being and violate S.S.'s constitutional right to be reasonably safe from harm, thereby entitling Plaintiff

to punitive damages.

WHEREFORE, Plaintiff prays that:

a. This Court declare that Defendant Barnett was deliberately indifferent to the Plaintiff's safety and liberty interests in violation of the Plaintiff's rights under the Due Process Clause of the Fourteenth Amendment to the United States Constitution.

b. That this Court award Plaintiff actual and punitive damages;

c. That Plaintiff be awarded costs and attorney's fees for this action; and

d. For such other and further relief as this Court deems just and proper.

COUNT IV

For Count IV of Plaintiff's Complaint against Defendant Montgomery, Plaintiff states and alleges as follows:

50. Plaintiff hereby incorporates by reference as though fully set forth herein paragraphs 1 through 49 of her Complaint.

51. The Missouri Division of Family Services contracted with Defendant Montgomery, a licensed psychologist, to treat Plaintiff beginning in April of 1995.

52. Defendant Montgomery's Monthly Report dated November 21, 1995, indicates her awareness that the father's friend, Joel Griffis, was a pedophile and that he was having

contact with S.S.

53. On or about March 11, 1996, S.S. told Defendant Montgomery that the father's roommate "Blinky" had touched her and ". . . asked her to touch him."

54. Although in receipt of Dr. Gregory Sisk's psychological evaluation of the father and the concerns expressed within, Defendant Montgomery continued to condone the unsupervised contact between S.S. and her father.

55. On or about August 21, 1996, Defendant Montgomery recommended to the Division of Family Services that S.S. be returned to the custody of the father.

Further, on or about August 15, 1996, the father admitted to defendant Montgomery, after repeated denials, that he had been allowing contact between Griffis and S.S., ". . . sometimes every day. . ." all along. The father also admitted to Montgomery that he had told S.S. to lie about the contact.

56. That Defendant Montgomery had an affirmative duty to protect S.S., a child in the State's custody from reasonably foreseeable injury.

57. That Defendant Montgomery failed to exercise professional judgment in recommending the child's release from the custody and protection of the State because she knew or should have known that the father had not protected and would not protect the child from a known pedophile and that S.S.'s subsequent sexual molestation was reasonably foreseeable.

Further, Defendant Montgomery failed to comply with State statutes, including, but not limited to, Section 210.115 R.S.Mo. regarding the reporting of allegations of sexual abuse to a child.

58. The above-described actions by Defendant Montgomery deprived Plaintiff of her Civil Rights and have caused her actual damages.

59. The above-described actions by Defendant Montgomery show a deliberate and conscious indifference to the Plaintiff's safety and well-being and violate S.S.'s constitutional right to be reasonably safe from harm, thereby entitling Plaintiff to punitive damages

WHEREFORE, Plaintiff prays that:

a. This Court declare that Defendant Montgomery was deliberately indifferent to the Plaintiff's safety and liberty interests in violation of the Plaintiff's rights under the Due Process Clause of the Fourteenth Amendment to the United States Constitution;

b. That this Court award Plaintiff actual and punitive damages;

c. That Plaintiff be awarded costs and attorney's fees for this action; and

d. For such other and further relief as this Court deems just and proper.

JURY DEMAND

Plaintiff hereby requests a trial by jury on all counts of her Complaint.

Respectfully submitted,

POLSINELLI, WHITE, VARDEMAN & SHALTON
A PROFESSIONAL CORPORATION

By [original signed by Ellen D. Jervis]
Ellen D. Jervis (#39465)
700 West 47th Street, Suite 1000
Kansas City, Missouri 64112
(816) 753-1000
Telecopier (816) 753-1536

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EDJER 513891